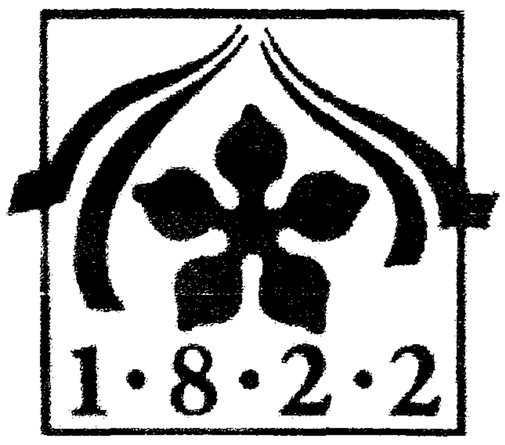

THE CONTRIBUTIONS OF ISLAMIC LAW TO THE MARITIME LAW

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Submitted to University of Wales in fulfillment of the requirements for the Degree of Doctor of Philosophy

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2004

Declaration

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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In the name of Allah, Most Gracious, Most Merciful

It is Allah Who has subjected the sea to you, that ships may sail through it by His command, that ye may seek of His Bounty, and that ye may be grateful.

Qur'ān 45:12

اللَّهُ الَّذِي سَخَّرَ لَكُمُ الْبَحْرَ لِتَجْرِيَ

الْفُلْكُ فِيهِ بِأَمْرِهِ وَلِتَبْتَغُوا مِنْ

فَضْلِهِ وَلَعَلَّكُمْ تَشْكُرُونَ

الجاثية (12)

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TRANSLITERATION OF ARABIC

In this research, the author uses the following Arabic transliteration system:

أ = a	غ = gh
ء = ‘	ف = f
ب = b	ق = q
ت = t	ك = k
ث = th	ل = l
ج = j	م = m
ح = ḥ	ن = n
خ = kh	ه = h
د = d	و = w,
ذ = dh	ي = ī, y
ر = r	لا = lā
ز = z	ّ = 2 letters
س = s	التنوين = n
ش = sh	المد = , ā, ī
ص = ṣ	بَ = ba
ض = ḍ	بِ = bi
ط = ṭ	بُ = bu
ظ = ẓ	بيْ = bay, bai
ع = ‘	بوْ = baw, bau

ABSTARCT:

One of the distinctive features of maritime law is the widespread of its principles and doctrines across the globe. This is mainly due to the fact that its provisions were derived from the prevailing customs of a particular era. It was first introduced during the medieval ages, when the transportation vessels used were very traditional. However, its general principles are still applicable today.

An examination of existing studies on the issue of the evolution of the principles of maritime law reveals that there are not many studies in the field; and even so, they focused merely on the set of legal collections that were initiated during the medieval era, thus, overlooking the contributions made by Islam to science in general and to maritime law in particular.

Historically, during the so-called period of the evolution of the doctrines of Maritime Law, Islam dominated the Mediterranean region, namely Southern Italy, Spain and the Island of Oleron in France, where the legal collections of maritime law were established. It is only natural that Islamic civilisation would have a great influence not only on the different aspects of life, but also on the different sciences of the time. Previous studies, however, failed to underline this influence vis-à-vis the evolution of the doctrines of maritime law and the contributions made by Muslims to science and other fields, including maritime law.

The importance of this research, therefore, is to focus on the contributions of Islam to the field of maritime law, in an attempt to discuss those doctrines in the light of Islamic maritime law and to clarify any ambiguities surrounding some principles of the maritime law.

1. INTRODUCTION:

1.1 THE DEFINITION OF SHARĪ'A:

Before explaining the meaning of *Sharī'a* there is one point which needs to be clarified, which is the concept of Islamic law. Generally, the concept of "Islamic law" is attributed to the Islamic legal issues or what Muslim scholars refer to as "*mu'āmalāt*". These "*mu'āmalāt*" are governed by the appropriate Islamic Laws. Nevertheless, this study will only focus on Maritime Law. During the course of this study I shall use both *Sharī'a* and Islamic law interchangeably.

There is an ambiguity which surrounds the meaning of *Sharī'a* when people merely refer to the legal aspects in people's lives. But, the term *Sharī'a* has meant various things to various people over the years[1]. In fact, this term is collective in the sense that it includes every aspect of life, both the divine and earthly transactions. It is argued that there has been no definite definition of *Sharī'a* that is accepted by all Muslims[2].

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[1] Lombardi, C.B., "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State," (1998) 37:1 *Columbia Journal of Transnational Law*, 81 at 87.
[2] *Ibid.*

But what does *Sharī'a* mean? The Arabic dictionary defines *Sharī'a* as 'the road to the watering hole' or 'the straight path to be followed'. However, this study is concerned with the technical meaning of *Sharī'a*, which is still not diverted from the dictionary meaning. According to *Sharī'a*, there is no clear-cut definition for the concept of *Sharī'a*. The *Sharī'a*, being of a divine nature and thus sacred, not merely embodies those aspects of law recognisable per se by western secular standards, but also embraces religious ethics to rule every aspect of a Muslim's life. Consequently, the *Sharī'a* is more appropriately known as a "doctrine of duties," or "a guide to mankind"[3]; and Muslims agree that *Sharī'a* is the totality of Allah's normative categorizations of human behaviour. Islamic law has categorised every conceivable behaviour within five ethico-legal categories: obligatory (*wajib*), recommended (*mandūb*), permissible (*mubāḥ*), reprehensible (*makrūh*), and forbidden (*ḥarām*).

However, there are various definitions of *Sharī'a*. It has been referred to as "the body of rules that God revealed to men in the sacred texts of Islam"[4]. Another commentator[5] defines it as a fundamentally "a doctrine of acts and obligations based entirely on revealed sources – namely the *Qur'ān* and

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[3] Ryner, *The Theory of Contracts in Islamic Law*, (1991), 1-2.
[4] Lombardi, *op.cit.*, at 91.
[5] Muslim, A., "Islamic Laws in Historical perspective: An Investigation into Problems and Principles in the field of Islamization," (1987) 31: 2 *the Islamic Quarterly*, 69.

Sunna." Another legist[6] defines it as "The way ordained by God which includes all behaviour – spiritual, mental and physical. It includes both faith and practice, assent to a belief in one God is part of the *Sharī'a* just as are religious duties of prayers and fasting etc. Further, all legal and social transactions, as well as all personal behaviour come under the *Sharī'a* as the comprehensive principle of the total way of life."

The first two definitions are general in the sense that they refer to the general rules revealed to the Prophet (ppbuh) in the sacred literature, namely the *Qur'ān* and *Sunna*, of Islam. The third definition is comprehensive. In fact, the concept of *Sharī'a* must include three areas: (1) acts of faith and divinity (2) moral code that is concerned with self-discipline and enhancement of character and (3) human behaviour and its relationship with Allah and other fellow human beings. It is worthy of note that as a result of the Prophet's (ppbuh) death, access to the divine revelation became sealed; and that covers the first and second area mentioned above. The third area, nevertheless, which is the subject matter in this research, comes under the definite term, "*fiqh.*" Etymologically, the word "*fiqh*" is derived from the Arabic root verb "*faqiha*" (to understand). However it acquired another meaning which embraces all the practical aspects of Islamic life. In other words, the entire religious, penal, criminal, civil and commercial laws are encompassed in this section of Islamic scholarship.

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[6] Fazlur Rahman, *Islam*, (London: Weidenfeld and Nicolson) (1966), 68.

1.2 THE SOURCES OF ISLAMIC LAW:

Islam has the character of jural order which regulates life and beliefs according to a set of rules revealed to Prophet (ppbuh). It basically established its own order of right and wrong, incorporating its justice, as solely correct and valid. Its model system is derived from a high divine source incorporating Allah's will and justice. According to Islamic legal theory only Allah the all-mighty, as the source of ultimate authority, has the knowledge of the faultless law.

Essentially, all sources of Islamic law must be in coherence with Allah's will as revealed in the noble book of *Qur'ān*. The primary sources are:

Qur'ān.

Sunna.

Consensus (*ijmā ʿ*).

Judicial *Qiyās*.

1.2.1 QUR'ĀN:

Qur'ān is the fundamental source of *Sharī ʿa*, as it details the principles of belief (*ʿaqīda*), transactions (*muʿāmalāt*) and rights (*ḥuqūq*) in general. It is the constitution for Muslims, and this is the reason why it is considered as the original source of legislation.

Although the *Qur'ān* is the primary source of Islamic Law and deals with rules in a general way, it does not give details except in some issues since these details would probably affect one of its main purpose; the masterpiece of eloquent Arabic (*balāgha*). Take for instance prayer and almsgiving (*zakāt*). These are compulsory, yet the *Qur'ān* does not give details as to how these should be performed. Such details are mentioned in the *Sunna*. In addition, the *Qur'ān* stipulates that contracts be executed: "*O ye who believe! Fulfil (all) obligations*"[7], legalises sale and condemns usury (*riba*) "*but Allah hath permitted trade and forbidden usury,*"[8]. Nevertheless, it does not explain what these contracts are and when such contracts are legitimate and the rights and obligations of parties. These matters are the concern of the *Sunna*.

1.2.2 SUNNA:

1.2.2.1 DEFINITION AND JUSTIFICATION:

It is the second source of Islamic law, according to the following *ḥadīth* (hereinafter referred to as "*ḥadīth* of Muʿādh"). When the Apostle of Allah (ppbuh) wanted to send Muʿādh Ibn Jabal to Yemen, he asked him: "How will you resolve a matter or a dispute? He replied: "I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not

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[7] *Qur'ān* 5:1.
[8] *Qur'ān* 2:275.

find any guidance in Allah's Book? He replied: (I shall act) in accordance with the *Sunna* of the Apostle of Allah (ppbuh). He asked: (What will you do) if you do not find any guidance in the *Sunna* of the Apostle of Allah (ppbuh) and in Allah's Book? He replied: I shall do my best to form an opinion and I shall spare no effort. The Apostle of Allah (ppbuh) then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Apostle of Allah to find something which pleases the Apostle of Allah.

Sunna is any utterance (*qawl*) or performance (*ʿamal*) or even confirmation (*taqrīr*) reported by the Prophet (ppbuh). The Sunna derived its justification from the holy *Qur'ān*:

"So take what the Messenger assigns to you, and deny yourselves that which he withholds from you."[9]

"He who obeys the Messenger, obeys Allah."[10]

"But no, by thy Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction"[11].

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[9] *Qur'ān* 59:7.
[10] *Qur'ān* 4:80.
[11] *Qur'ān* 4:65.

1.2.2.2 THE RELATION BETWEEN SUNNA AND QUR'ĀN:

Sunna is seen by Muslims to be a divine inspiration, but unlike the *Qur'ān*, it cannot be recited. Its role is to explain (*sharḥ*), to state (*bayān*) and to interpret (*tafsīr*) the *Qur'ān*, in the following way:

It may agree and assert a Qur'ānic rule. This principle can be found in several occasions.

It may give details to some general Qur'ānic rules. For example, there are several *ḥadith* that give details on how to perform prayer and pay *zakāt*. It may restrict general rules. For instance, the *Qur'ān* stipulates that the right hand of a person caught stealing be amputated: "*As to the thief, male or female, cut off his or her hands*"[12]. The Sunna restricts this meaning to the amputation of the hand from the wrist. The role of the Sunna is to single out some general Qur'ānic principles as in the case of: "the murderer does not inherit" whereas in the *Qur'ān* Allah says "*Allah (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females*"[13]. It may even clarify some problematic matters as in the verse "*and eat and drink until the white thread of dawn appear to you distinct from its black thread*"[14]. The Apostle of Allah (ppbuh) clarifies such verse by saying it is the whiteness of daytime and blackness of night.

It may bring up a detailed rule whilst the *Qur'ān* is silent about it. Hence it does not establish the rule and even does not quote any contradicting rule, such as, the legitimacy of mortgage at present (*mashrūʿiyyat al-rahn fil*

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[12] *Qur'ān* 5: 38.
[13] *Qur'ān* 4:11.
[14] *Qur'ān* 2:187.

ḥaḍr), the prohibition of marrying a women and its aunt at same time and the right of pre-emption (*ḥaq al-shufʿa*).

1.2.3 CONSENSUS (AL-IJMĀʾ)

This is the third source. It is the agreement of diligent jurists in a particular time upon legal ruling. The justification for its validity as a source after the *Qur'ān* and *Sunna* is expressed in the *Qur'ān*: "*If anyone contends with the Messenger even after guidance has been plainly conveyed to him, and follows a path other than that becoming to men of Faith, We shall leave him in the path he has chosen, and land him in Hell, what an evil refuge*"[15]. Generally, this verse indicates that the path of believers is the right one, and when a rule is established by scholars, such rule should be complied with. Furthermore, "*Thus have We made of you a nation justly balanced, that ye might be witnesses over the nations, and the Messenger a witness over yourselves*"[16], ranks Muslims as the average nation, and being so, they do not reach agreement wrongly[17].

According to *Sunna*:

"My nation does not concur upon error."

"What Muslims see as sound, it is also sound to Allah."

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[15] *Qur'ān* 4:115.
[16] *Qur'ān* 2: 143.
[17] Hussain, A.F., *Uṣūl al-Fiqh al-Islāmi*, (Beirut: al-Dār al-Jāmiʿiyya) (1991), 82.

The Apostle of Allah (ppbuh) said: "I asked Allah that my nation does not concur upon error and He gave it to me."

As far as the aforementioned evidences are concerned, the consensus is a source among the primary sources, and jurists often adopted it.

1.2.4 AL-QIYĀS:

1.2.4.1 DEFINITION AND JUSTIFICATION:

It is the fourth source of Islamic law. It has been confirmed that the Prophet used it in more than one hundred occasions[18]. *Qiyās* is a technique for reaching a legal decision on the basis of a precedent in which a common reason, or an effective cause, is applicable. While the statements of *Qur'ān* and *Sunna* are limited, precedents are not limited; and the only way to provide ruling for new cases is to follow interpretative judgement (*al-ijtihād bil ra'i*) in addition to *al-qiyās*.

This fact is explicitly expressed in the following verse: "O ye who believe! obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: that is best, and most suitable for final determination."[19] This verse indicates that in resolving a dispute one should refer to the *Qur'ān* and *Sunna* in general and

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[18] *Ibid*, at p. 88.
[19] *Qur'ān* 4:59.

to their understanding by matching their principles and deriving the ruling from similar issues when both matters are similar in their cause[20].

Another justification can be found in the aforementioned *ḥadīth* of Muʿāth, in the preceding *ḥadīth* when Muʿāth was asked: "(What will you do) if you do not find any guidance in the *Sunna* of the Apostle of Allah (ppbuh) and in Allah's Book? He replied: I shall do my best to form an opinion (*ajtahid fi ra'yee*) and I shall spare no effort." Basically, *ijtihād*[21] includes *qiyās* as the latter is a type of *ijtihād*. In addition, Omar Ibn al-Khaṭṭāb advised Abi Mūsa Al-Ashʿari, saying: comprehension, comprehension for what is confused in your heart, for what is not mentioned in the *Qur'ān* neither in the *Sunna*, you must know the likenesses and examples and match precedents according to its equivalents (*naẓā'ir*) and follow what is nearer to Allah and similar to rightness[22].

1.2.4.2 EXAMPLES FOR QIYĀS:

Qur'ān prohibits business at the time of al-Jumʿa prayer as the following verse suggests: "O ye who believe! When the call is proclaimed to prayer on Friday (the Day of Assembly), hasten earnestly to the Remembrance of

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[20] Hussain, A.F., *op.cit.*, p. 96.

[21] *Ijtihād* is exerting the sum total of one's ability attempting to uncover Allah's rulings on issues from their sources.

[22] Al-Zarqa, M. A., "*Al-Istiṣlāḥ wal Maṣāliḥ al-Mursala fil Sharīʿa al-Islāmiyya wa Uṣāl Fiqhhiha,*" (Damascus: Dār al-Qalam) (1988), 17.

Allah, and leave off business (and traffic): that is best for you if ye but knew"[23]. The reason for such prohibition is that any such transaction will cause people to neglect the obligatory pray. Analogically, scholars prohibit other transactions such as, renting, mortgage and other type of contracts as all of them are parallel in justification of the previous verse.

Moreover, many principles of sale are mentioned in the holy *Qur'ān* and are more numerous than those of rent. As a matter of fact, scholars use those principles and apply them on contracts of rent because they are analogous to the contract of sale, and because rent is selling usufructs.

In fact, there are many rulings that have been established by *qiyās*, because the precedents never stop occurring, and that is the reason why many principles in this study are established in the Maritime Law through *qiyās*.

1.3 METHODOLOGY & GUIDE TO CHAPTERS:

Generally, this is a library-based research. It relies heavily on textbooks or as described by the Islamic legists "*ummahāt al-kutub*." In fact, this is consistent with the aim of this study which is the clarification of some ambiguities surrounding the root of some Maritime Law principles under the Islamic law, and also the importance of Islamic law as a source of modern Maritime Law. Therefore, these aims entail the investigation of the

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[23] *Qur'ān* 62:9.

issue in textbooks which are believed to be indisputable and reliable among scholars. However, there is not enough material that deals with the history of Maritime Law; and this lack appears to be the main obstacle this study has faced, because most writers refer extensively to one writer only, the noted French legist Pardessus. Another obstacle was that material on the history of Maritime Law was in French.

This study is divided into seven chapters. Chapter two discusses the legal collections that emerged in the medieval era and which are deemed by the legists to be the fundamental sources of modern Maritime Law. This is an essential chapter in this research, as it explores the origin of these collections. We shall find out at a later stage in this study the Islamic influence on these collections.

The remaining chapters is an analysis of selected branches of maritime law, namely, the law of charterparty, contract of bills of lading, the law of Collision, law of salvage, law of general average and the doctrine of limitation of liability. These examples represent the main body of the maritime law. Therefore, chapter three demonstrate the maritime exploitation or contract of affreightment as in the case of the law of charterparty and contract of bill of lading. Chapters four and five discuss the maritime casualties as in the law of collision and salvage, and chapters six and seven cover the fundamental areas of maritime law, namely the limitation of liability and the law of general average.

The foregoing areas may cover any maritime adventure. The probable maritime adventure may pass through a range of phases. There is, to begin with, exploitation (contract of affreightment), then the vessel may encounter the danger of collision. In the case of such incident, salvage services may be needed. Hence, the law of general average is enforced and the shipowner becomes entitled to limitation of his liability.

These chapters also highlight some elementary principles that are recognised in the modern maritime law. In terms of methodology, I have adopted one methodology from chapters two to seven, explaining in details the Islamic principles under each area of the selected branches of maritime law according to the orthodox schools of thought, namely Ḥanafi, Shāfiʿi, Ḥanbali and Māliki schools. Then the Islamic thought and the legal collections of medieval era are compare, namely the Rhodian Sea Law, the Rules of Oleron and the Consulate of the Sea.

The present study uses literature in English, except for the history of maritime law. Material on the general principles of maritime law was in French and Arabic. As regards Islamic maritime principles, the present study relies, to some extent, on judicial *qiyās*, the noble *Qur'ān* and the Prophetic *ḥadīth*. The term "*Sunna*" is used interchangeably in this research with the Prophetic *ḥadīth*. As for the provisions of the aforementioned collections, namely the Rhodian Sea Law, the Rules of Oleron and the Consulate of the Sea, I referred to the following books consecutively *the*

Rhodian Sea-Law[24], *the Black Book of the Admiralty*[25], and *Consulate of the Sea and related documents*[26].

1.4 LITERATURE REVIEW:

Lack of literature in English was one of the obstacles the present study faced. In order to surmount this obstacle, the research relied on literature in French language. And even the relevant literature in French was very scarce as it refers mostly to the noted J.M. Pardessus in his unique priceless literature, *Collection de Lois Maritimes Antérieures au XVIII Siècles*. However, there are some handful English studies which helped me and actually directed me towards the current study. The following paragraphs present such studies:

1.4.1 THE HISTORICAL POSITION OF THE RHODIAN LAW[27]*:*

Benedict, the compiler of this study, attempted to find out the influence of the Rhodian Sea Law on the Roman Maritime Law. He discussed the authenticity of the Rhodian Sea Law, criticizing the writers who asserted the position of predecessors without giving themselves time to scrutinize such

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[24] Ashburner, W., *The Rhodian Sea-Law*, (Oxford: the Clarendon Press) (1979).
[25] Twiss, T., *The Black Book of the Admiralty*, (London: Longman) (1871), vol. 1.
[26] Jados, S.S., *Consulate of the Sea and Related Documents*, (Alabama: Univ. of Alabama Press) (1975).
[27] Benedict, R.D., "The Historical Position of the Rhodian Law," (1909) 18 *Yale Law Journal*, 223-242.

assertion. He was convinced that the so-called collection was a fabrication of an unknown date, and reached the conclusion that the Roman maritime law was not indebted to the foregoing collection save for one principle applicable to the case of jettison.

1.4.2 THE MARITIME LAW OF ROME[28]:

In the early stages of this research, Lobingier reiterated what was adopted by the aforementioned belief of Benedict that Roman Maritime Law does not owe anything the Rhodian Sea Law. He quoted many of the aforementioned statements of Benedict to support his perspective. He subsequently provided some aspects of Maritime Law of Rome to prove that there were some principles of Maritime Law applied in various area namely, law of sea, ship and crews, wreck, cargo, jettison, general average, collision, salvage, obligations of parties, jurisdictions and procedures. He concluded that the Roman Maritime Law was as complete, for its time, as the modern Maritime Law.

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[28] Lobingier, C.S., "The Maritime Law of Rome," (1935), 47 *Judicial Review*, 1-32.

1.4.3 THE ROLLS OF OLERON (SIC.) AND THE ADMIRALTY COURT IN FOURTEENTH CENTURY ENGLAND[29]*:*

The author of this study attempted to identify the laws (rules) of Oleron and their relationship to the development of the Admiralty Court which administered them. Runyan examined the origin of the Rules of Oleron, and rejected the belief that the Rules, which were a collection of court judgments, were laid down neither by Otto, Duke of Saxon, nor Eleanor of Aquitaine nor Richard the Lion heart. However, he argued that the Rules were compiled in the fourteenth century and consisted of judgments of the court of Oleron, which were based upon prevailing customs.

1.4.4 THE PRINCIPLES OF ISALMIC MARITIME LAW[30]*:*

In her research, Noble outlines the principles of Islamic maritime law, asserting in different stages that Islamic doctrines of maritime law were much the same as they are today, and that Muslim jurist developed very capable maritime principles encompassing all or most aspects of maritime law.

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[29] Runyan, T.J., "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England," (1975) 19 *The American Journal of Legal History*, 95-111.
[30] Noble, D.R., *The Principles of Islamic Maritime Law*, unpublished PhD thesis (1988) University of London SOAS.

1.4.5 THE LAW OF CHARTERPARTY WITH PARTICULAR REFERENCE TO ISLAMIC LAW[31]*:*

This study aims to explore the law of charterparty with reference to Islamic law. The researcher discussed the principle under various regimes, namely, the modern law, Islamic law, and some Arab countries legislation. He concluded how the Muslim scholars apply the principles of hiring animals (*ijārat al-ḥaywān*) to the law of charterparty.

1.4.6 THE PRESENT STUDY:

What distinguishes the current study from the aforementioned studies is that it brings the Islamic law to the surface of Maritime Law in order to answer certain questions on the origin medieval legal collections of Maritime Law.

Generally, it shows how Muslim scholars contributed some doctrines to the area of maritime law. Also, this study does not go into details but rather discusses the principles that create ambiguity regarding its evolution among maritime legists as in the case of the doctrine of division of loss in the law of collision, the assessment of general average, the duty to provide salvage services to the ship that face danger. Moreover, the study confirms that Muslims were the first people who recognise the contract of bill of lading.

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[31] El-Ghirani, M., *The Law of Charterparty with Particular Reference to Islamic Law*, unpublished PhD thesis (1990) Glasgow College.

Although Roman maritime law includes some principles of maritime law (as in the aforementioned first two studies), it does not provide answers to the forgoing doctrines, and there are even some doubts over its inclusion of some principles of maritime law[32]. The researcher in the third study asserted that Rules of Oleron was a judgement of the court of Oleron, but the present study proves that such judgments were influenced by Islamic principles. As for the last two studies, they do not provide a historical background to the Islamic principles as the present study does.

1.5 HISTORICAL GENESIS:

1.5.1 THE LACK OF LITERATURE ON THE HISTORY OF MARITIME LAW:

By and large, the accurate and comprehensive understanding of a given law with all its aspects entails an understanding of its history and original sources. For example Maritime Law, the subject matter in this research, is indisputably more authentic and unique system than other branches of law. It evolved from a set of customs, away from the influence of Roman law. Its authenticity is derived from the perils to which navigation activities were exposed.[33]

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[32] Gold, E., *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, (1981) (Lexington: Mass).
[33] Rodière, R., *Traité général de droit Maritime, Introduction* (1976) (Paris: Dalloz), p. 3; see also, Gold, E., *Maritime Transport*, (Toronto) (1981).

Maritime law, including charterparty law, was born internationally[34]. Hence in passing judgments, admiralty courts in commercial ports relied on and implemented rules from other sources, such as the Rules of Oleron, the Consulate of the Sea and the Rhodian Sea Law. It was only then that the so-called customs framed a general law which was implemented in various coastal cities.[35]

The contemporary Maritime Law contains some distinctive principles compared to other branches of law. It goes without saying that there is an enormous difference between traditionally-equipped ports and modern ports, and between the traditional vessels used in medieval times, and modern vessels used today. Nevertheless, many ancient rules pertaining to Maritime Law which governed ports and vessels were preserved; and despite the fact that Maritime Law was exposed to a number of amendments, legists defended its ancient principles and linked them to gross risks.[36] Maritime Law is a branch of private law, which means that it does not include fundamental concepts and criteria that accompany its implementation. Therefore, it is important for those working in the fields where maritime law is applicable to comprehend its sources and evolvement stages in order to apply the principles of private law that are sufficient enough for a better understanding of maritime law.

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[34] *Black Book of the Admiralty*, vol. 2, p. xxxix.
[35] *Ibid*, pp. xxxix *et seq*.
[36] Rodière, R., *Traité général de droit Maritime*, 3.

Although some eighteenth and nineteenth century writers talked about the history of maritime law, their works remain incompatible with the concepts of contemporary era. From this standpoint, it becomes important to identify the element of innovation in the maritime law, using a modern methodology in order to comprehend the true sources of maritime law.

Romano argued that previous studies on the history of maritime law contradicted the history of law, economics and history in general. According to him, these studies did not take into account a specific fraction of society in order to come to grips with the problems of society at large. On the contrary, these studies were mainly concerned with the gratification of the desires of legists who use history as a means to understand and analyse the applicable law. Therefore, these studies are of no importance, and their approach to the concept of maritime law remains inadequate.[37] During the past sixty years, several writers expressed their concern about the lack of research in the field of maritime law and hoped to come across new research in the field. Surprisingly, there is not any book written on the subject of maritime law in Britain before 1590.[38] In 1934, Gian Piero Bognetti and Arrigo Solmi indicated that the origin of maritime law was not focused on during the medieval era. They noticed that the Italian cities codes of Amalfi, Pisa and Venezia referred to the period between the twelfth century and the thirteenth century, whilst the Italian merchants and sailors'

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[37] Romano, R., "L'édition critique des textes relatifs au droit de la mer," *Revue historique de droit français*, (1962), 64 et seq.
[38] Senior, W. "Early Writers on Maritime Law," (1921) 37 *Law Quarterly Review*, 323.

activities took place before the medieval era. These codes suggested that they have common origin, and it is from these codes that maritime law, with all its current principles, was derived.

Therefore, the aforementioned scholars called for endeavours to be directed towards the identification of the common origin from which the current maritime law emerged.[39] It is worth mentioning in this context that in a conference on the history of science, held in Stockholm in August 1960, Romano raised the issue of the lack of literature on maritime law, suggesting that an analytic study of the provisions of maritime law be undertaken.[40] In reality, there are several unanswered queries which are either related to the root of some principles of maritime law or even to the composition period of the sets of legal collections. Therefore, la raison d'être of this humble endeavour is to answer some of the questions related to the origin of some principles of maritime law, in a concerted attempt to remove ambiguities which may surround these principles. The aim is also to provide researchers in maritime law with an insight into maritime law in general, and the origin of some of its principles in particular.

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[39] Romano, *supra*, at 64.
[40] *Ibid.*

1.5.2 THE IMPORTANCE OF THE FIRST PERIOD OF THE MEDIEVAL AGE:

The twelfth century has been traditionally regarded as a milestone for changes at almost the entire levels of medieval society.[41] In fact, the medieval age was an important period for maritime law because, it was the period during which the set of customs and codes emerged. These codes and customs include a number of rules deemed to constitute the origin of current maritime law. Therefore, it is imperative to identify the origin of these rules.

Many historians believed that the aforesaid rules and customs were initiated by the Greek-Roman law, and through the trade which was set up along costal cities during the Crusades. However, these historians failed to recognize the first period of the medieval era despite its underlying importance.[42]

It appears that the most developed studies dispute this fact, arguing that the influence of Roman law is confined to the mercantile area and that the Crusades cannot be deemed as one factor among other factors of economic development. Furthermore, the economic revolution which Europe experienced during the first period of the Medieval age was the result of

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[41] Pascua, E., "South of the Pyrenees: Kings, Magnates and Political bargaining in twelfth-century Spain," 27:2 *Journal of Medieval History*, 2001, 101 at 102.

[42] The first period of medieval era commences from the fifth century, that is to say when the Roman Empire was collapsed and was split into eastern part and western part. Muslims played vital role from the eighth century and explored the entire area of knowledge.

Arabs and Greeks' involvement in trade. Haskins denied the fact that the Crusaders played an important role in bringing any type of education or even any trade because, according to him, they (the Crusaders) "were men of action, not men of learning"[43].

1.5.2.1 GREEK-ROMAN LAW:

It is common knowledge that the Romans and Greeks were very much attached to land, and would condemn trade and merchants; either on the basis of their old customs, specific circumstances linked to ancient ages, or a particular opinion on trade in general in the past or in the present time.[44]

And despite the fact that the Digest of Justinian contains some rules concerned with the issue of Maritime, entitled "Lex Rhodia de Jactu," historians assumed that these rules were implemented in Greece during the ancient ages. In other words, historians could not give a precise time as to when such rules were incorporated into the Roman law, except hypothetically because, these rules were not authenticated by historical documents.

Pardessus remarked that Roman law was not supportive enough to raise trade. Yet he assumed that during the Republic Age, the Romans were

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[43] Haskins, C.H., *The Renaissance of the Twelfth Century*, (1927), at p. 282.
[44] Rouge, *Recherches sur l'organisation du Commerce Maritime en Méditerranée sous l'Empire Romain*, 1966, 11.

capable of practicing trade through the exploitation of slaves; and Roman judges extracted commercial laws, which were later implemented during the Greek age. However, Pardessus admitted that his argument was merely a personal assumption, lacking any historical documents to support it. He mentioned that it is probable since the silence of historians, and most surprisingly, the silence of legists who wrote and commented on these rules eloquently, without any reference as to which age these rules were incorporated into the Roman law.

Pardessus also indicated that the import of and sometimes the texts are known, but such texts are not recognized through the literature that was written after that age. Therefore, the history of law lacks documentation, and only assumptions were put forward as a means to make up for this shortage.[45]

By contrast, it appears that the impact of Roman law on the area of maritime law was limited, even less visible in the ninth and tenth centuries, and, in some cases, nonexistent.[46] Thaller said that the current maritime law was neither directly derived from the Greek law nor from the Roman law. The invasion of Europe, the aftermath of the collapse of feudal regimes, and some other factors all contributed to the emergence of modern trade, whose

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[45] Pardessus, J.M., *Collection des lois Maritimes antérieures au XVIIIe Siècle*, vol.1, 55.
[46] *Black Book of the Admiralty*, vol. 2, xl; Pineus, K., "Sources of Maritime Law seen from Swedish point of view," (1955) 30 *Tulane Law Review*, 85, at p. 86,

legislations would have been totally different than if it had been under the influence of Roman civilization.[47]

In reality, the rules of Maritime Law date back to the first period of medieval era. It appeared to historians that the Rhodian law, which is thought to be written before Christ, is merely a copy of codes and rules that evolved during the medieval era; since it can be referred to prior to the eighth century, and further, incorporated into the Roman law during that period.[48]

1.5.2.2 THE CRUSADES AND THEIR RELATION TO THE FLOURISHING OF TRADE:

Early historians believed that the Crusades were an extraordinary secret power behind the economic development in Europe. Whilst some of them indisputably adopted such belief without referring to any historical document, others, on the other hand, attempted to clarify such argument, using the cases that occurred throughout that period. Nevertheless, the results produced in this respect were conflicting.

When Pardessus studied the history of the twelfth and thirteenth centuries, he observed that the cities which economically prospered during that period were Amalfi, Pisa, Venezia, Genoa and Marseille. However, although he

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[47] Thaller, "De la place du Commerce dans l'histoire général et du droit commercial dans l'ensemble des sciences" *Annales de droit Commercial Français, étranger, et international, Paris*, 1892, p. 151.
[48] Huvelin, *Etudes d'histoire du droit commercial romain*, 1929, p. 185.

attributed the flourishing of trade in these cities to the Crusades and to the development of writing due to the big demand on paper, he could not, when giving justifications, overlook that the reports on these cities coincided with the Crusades. He stated, "The contributions of these cities were not effective during the first conquests." In fact, Pardessus ignored the real justification why such cities did not contribute to the Crusades. He said, "There is no need for investigation if there are any secret interests that coincided with the contributions of the so-called cities to the Crusades. Suffice it to say that the cities did not have enough vessels to transport the military heading for the holy land. [49]

Pardessus digressed in his comment from the issue and affirmed that the merchants of the so-called cities were affected by the Crusades. They attempted to build a respectable relationship during these wars with some other countries in order to obtain goods which they used to get from Syria. He affirmed that the end of the twelfth century and the beginning of the thirteenth century was a period which marked the relationship with Egypt; and those cities attempted to benefit from any country that gained an increased importance. This is due to the advent of apocalypse to the holy land which suggested its end. [50]

Contemporary studies in the field of economic history suggest that the economic revolution in Europe was the result of the contributions made by

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[49] Pardessus, *op.cit.* vol. 2, p. 7.
[50] *Ibid.*, vol. 2, p. 35.

the eastern countries throughout the first period of the medieval age. According to Lopez, there is no need to emphasise the role of the Crusades as an important factor in setting up economic relations between the East and the West. No one can overlook the abundance of booty, particularly during the first and fourth conquests. The conquerors gained a means of subsistence and brought it to their families. In fact, the Crusades were the end rather than the start, given that the economic renaissance was a cause rather than a consequence.[51]

1.5.2.3 THE ISLAMIC WORLD TRADE THROUGHOUT THE FIRST PERIOD OF THE MEDIEVAL ERA:

For four centuries (approximately between 800 and 1200), the lands possessed by the Arabs were the soil from which emerged and developed one of the greatest civilizations in the history of humanity.[52] One of the prominent features of the Islamic society during the first period of the medieval era was the flourishing of commercial activities. The people of Arabian Peninsula, the cradle of Islam, namely merchants, used to set out on long journeys to different parts of the world. They would take products and exchange them for other commodities, which they would sell and make

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[51] Lopez, R.S., "Les influences orientales et l'éveil économique de l'Occident," *Cahiers d'histaire mondiale*, 1945, T. 1, issue 3, 594 at 622.
[52] Saunders, J.J., *A History of Medieval Islam*, (1965), 187. Also see, Dawson, C., *Making of Europe*, (1953), 118.

profits.[53] It is believed that Merchants from the reign of the Caliphate were seen in places as distant as Senegal and Canton.[54]

From the eighth century, Muslims established a new economic market, stretching from the Indian Ocean to the Atlantic Ocean. It is noted that the circumstances within the Islamic world were beneficial as a result of the booming of various economic activities and the freedom of moving people and properties. In short, the Islamic ruling dominated the scene during that period of time.

1.5.2.3.1 THE ARABIAN TRADE AND THE EUROPEAN ECONOMY:

Henri · Pirenne, a Belgian historian, argued in his *Muhammad and Charlemagne* that the Arabian conquest of the Mediterranean was the fundamental reason for the decline of trade in Europe during the first period of the medieval age. He noted the disappearance of four commodities from the European market, namely, golden coin, luxury textile, papyrus and spices; and considered that such disappearance marked a break in the economic relationship between the East and the West.[55]

In fact, Pirenne's view seems to have a tendency that is different from that of other writers. He arrived at the conclusion that the German invasions

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[53] Lewis, B., *Islam from the Prophet Muhammed to the Capture of Constantinople*, New York, 1974, vol. 2.
[54] Saunders, J.J., *op.cit.*, at p. 189.
[55] Pirenne, H., *Mohammed and Charlemagne*, translated by Bernard Miall, (1939), 150.

neither demolished the Mediterranean harmony of the ancient world, nor what may be deemed as the truly fundamental features of the Roman culture which still existed during the fifth century; a time when no Emperor existed in the West.[56] Scholars, however, rejected this theory on the grounds that the German invasions of Western Europe in the fifth century was followed by a long 'dark age' of barbarism and ignorance. By contrast, the Muslim invasions in the seventh century were followed by a general progress at the cultural level of the countries affected by them.[57]

Dawson[58] stated that there is a big difference between the Arab and the German conquests in the West. In fact, understanding the difference between the two conquests, and in particular, the uniqueness of the Islamic conquest, requires an understanding of Islam and its fundamental principles in general. It is not the place here to dwell on this issue. However the objective of Islamic conquest, briefly, was to spread Islamic teachings and rites in every single city, rather than, as it is claimed, to merely dominate the world.

O'Callaghan challenged Pirenne argument, saying:

> "However, the greater part of Spain fell under Muslim reign and participated actively in the economic life of the Muslim world. Al-Andalus attained the height of its prosperity. Its cities earned an excellent reputation as centres of commerce and industry, populated by merchants who carried on an extensive trade with Africa, the Near

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[56] Pirenne, H., *op.cit.*, 284.
[57] Saunders, J.J., *op.cit.*, at p. 187.
[58] Dawson, C., *Making of Europe*, (1953), 118.

East and Byzantium, and by artisans who produced goods fine workmanship for the local market and for export. Gold and silver coins circulated throughout the country, and the agricultural regions shared in the general prosperity".[59]

After undertaking an economic analysis of the so-called period of time, Lopez affirmed that there was no causal connection between the Islamic conquest and the deterioration of trade in Europe:

> "It is just as difficult to imagine that the Arabian conquest was behind the international deterioration of trade as to say one of the consequences of such conquest was the presence of domestic revolution within the economic and social life in the West. This is to say that there was closed-economy followed by opened-economy. These trends were at the heart of the Western world itself. As for the disappearance of some merchandise, such disappearance could not be the result of the break of economic relationship between the West and East following the prevalence of Islam in the Mediterranean. There may be other reasons for such disappearance."[60].

1.5.2.3.2 ISLAM OPENED NEW ECONOMIC MARKETS:

Lombard holds, the aforementioned book of Muhammad and Charlemagne lacks a comprehensive overview of history, as it contains a brief and incoherent history on the subject of the influence of Islamic economy which he affirmed. He argued that the Arabian conquest did not go ahead when the European economy declined. When Lombard examined the same topic closely, he reached the following result: The decline of Europe's imports of

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[59] O'Callaghan, J.F., *History of Medieval Spain*, (1975), pp. 153-4.
[60] Lopez, R.S. and Raymond, I.W., *Medieval Trade in the Mediterranean world*, New York and London, (1961).

some goods during the seventh and eighth centuries from the East was due to the decline in Western economy[61].

Contrary to what Pirenne predicted, Lombard concluded[62] that Islam opened new economic markets, which attracted the West to the economic current created by the Islamic world. He adds, the Byzantine Empire was turned aside towards the area of the Black Sea.

Finally, international trade was created, as the ancient civilised centres and Islamic cities which were established and expanded in the western part of the Mediterranean led to a big demand on European goods.

1.5.2.3.3 THE HISTORIANS' IMPARTIALITY REGARDING THE MUSLIMS' TRADE:

In reality, credit should be given to Pirenne for being the first to write about the subject of economic relationship between the West and the East during the first period of the medieval era. He focused on the unbiased accounts of historians for the past sixty years, who arrived at the following conclusions: The deterioration of trade in Europe during the first period of the medieval age was due to the economic crisis in the Roman Empire in the third century and its aftermath. However, the dominance of Islamic trade from India to

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[61] Lombard, M., *Espaces et reseaux du haut Moyen - âge*, 49.
[62] *Ibid.*

Spain was one key factor which contributed to the European prosperity during the ninth century.[63]

As a result of the position of Muslims' trade during the eighth and ninth centuries, what was the Maritime Law that the Arabs implemented during that period? Undoubtedly, the legal rules that were implemented in the Islamic world during the first period of the medieval age were significant. This period is located between the old age, where the atmosphere was appropriate for the rising of international trade in the accurate meaning, and the age where Maritime Law was implemented in the entire area of the Mediterranean.

1.5.3 ISLAMIC MARITIME LAW:

We shall discuss the Islamic Maritime Law that emerged during the period between the eighth and the tenth centuries, which it is believed the origin of the Maritime customs that presented throughout the medieval age[64]. Basically, the Maritime trade in the Mediterranean was ruled by customs which did not vary in substances from one place to another[65].

From the second half of the eighth century, the Islamic legal school were established, the leaders were: Abū Ḥanīfa (died in 767), Mālik (died in 796),

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[63] *Ibid.*; Lopez, R.S., "Les influences orientales et l'éveil économique de l'occident," *cahiers d'histoire mondiale*, 1945, T. 1 no. 3, p. 524 *et seq.*
[64] Rodière, R., *Traité général de droit Maritime*, see in his introduction, margin 1, page 20.
[65] Selmer, K.S., *The Survival of General Average,* (London: Isaac Pitman & Sons) (1958), 20.

Al-Shāfiʿi (died in 820) and Ibn Ḥanbal (died in 855). They and their pupils helped *Sharīʿa* to reach its peak. They had broad authority in extracting rules and principles from the primary sources of Islam; consequently they established new legal rules and reached doctrines and approaches for analysis and interpretation.

I will rely in this study on references were written prior to the eleventh century, and also on some references were written after the so-called period, it is to be observed that the more recent literatures are merely interpretation of the opinion of aforesaid schools.

It is noteworthy that Muslims' scholars did not define individual rules for the Maritime Law and contract of affreightment and also there is no literature that covers this area. The Muslims' scholars studied Maritime Law rules via jurisprudence encyclopaedia, and with some exceptions due to the nature of the navigation the same rules of general rules of transportation is applicable to Maritime Law. The Muslims' scholars ranged over charterparties, the contract of affreightment and the law of jettison through the book of rent (*ijāra*), collision through the book of Guarantee (*ḍamān*), salvage through the book of missing properties (*al-laqta*) and the liability of shipowner through the book of contract of loan.

2. THE IMPACT OF ISLAMIC LAW ON THE SET OF MEDIEVAL AGES RULES:

2.1 INTRODUCTION:

It is noteworthy that maritime law consists of a collection of customs which were prevailing in the Mediterranean, and which established the fundamental principles of maritime law. The contemporary maritime law derives its principles and rules from three main legal sets, which emerged in the medieval age. One set was adopted by other ports, and others regulated the coastal trade of the entire medieval Europe[1]. These are:

The Rhodian Sea Law.

The Rules of Oleron.

The Consulate of the Sea.

Taken all together, these collections disclose the customary maritime law of the nations in an age where commerce was flourishing. Prior to the introduction of the sovereign state, a series of municipal legislation for the regulation of international commerce and navigation[2] was adopted. Such legal sets, it will be revealed, contain rules and principles which may have one common origin. Each set derives its name from a certain port[3].

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[1] *Black Book of the Admiralty*, vol. 2, xxxix et seq.
[2] Colombos, C.J., *International Law of the Sea*, (6th edn., 1967) (Longmans: London), 31.
[3] Holdsworth, W., *A History of English Law*, (London: Methuen & Co. Ltd. Sweet and Maxwell)(1966) vol. 1, 526.

It appears from the research that the writers of the aforesaid rules were inspired by the *Sharī ʿa* rules, which were implemented in the Mediterranean during the first period of the medieval era.

Historians affirmed that these legal sets had been written in provinces which were under Islamic influence, such as Southern Italy, Syria and Spain. It is suggested that most of the original articles of the rules of Oleron are found in the Consulate of the Sea, and some of them have similar wording[4].

This chapter is divided into three sections:

The Rhodian Sea Law.

The Rules of Oleron.

The Consulate of the Sea.

2.2 THE RHODIAN SEA LAW[5]:

2.2.1 THE DATE & PLACE OF PUBLISHING

Azuni called the Rhodian Sea Law "the fountain of maritime jurisprudence"[6]. It is alleged that the name of such collection was named after the city of Rhodes. Stabo established the foundations of the city in the

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[4] Flanders, H., *A Treatise on Maritime Law*, (Boston: Little, Brown & Co.) (1852), pp. 13-14, note 3.
[5] It is also called the Byzantine/Rhodian Sea-Law.
[6] Azuni, D.A., *The Maritime Law of Europe*, trans. William Johnson, (New York: I. Riley & Co.) (1806), vol. 1, 276.

year 408 before the Christian era[7]. What is characteristic about the Rhodian Sea Law (hereinafter referred to as "RSL") is that it must have been in fragments or detached articles, from various different sources[8].

This set was first published at Basle in 1591 by Simon Schardius, within a set that included agricultural and military laws; known as Justinian laws[9]. However, historians seem to agree upon the inaccuracy of such documents[10].

Reddie records three distinguished definitions which justify that this set is not the genuine laws of the ancient Rhodians: First, Latin words written in Greek characters. Secondly, a reference was made in one passage to the Rhodian law. Thirdly, a person who is in charge of the vessel is obliged to take an oath upon the Gospel[11].

It is observed that Antonius Augustinus is the one who handed this document to Simon Schardius[12]. It is noteworthy that this set of laws (RSL) was not deemed as part of the Roman law[13]; and Schard himself did not

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[7] Reddie, J., *Historical View of the Law of Maritime Commerce*, (Edinburgh and London: William Blackwood) (1841), p. 63.
[8] *Ibid.*
[9] *Ibid.*, p. 70.
[10] *Ibid.*, at pp. 71-2.
[11] *Ibid.*
[12] *Ibid.*, at p. 70.
[13] *Ibid.*, at p. 72.

mention the perspective of Antoine Augustin, who doubted its authenticity[14].

Surprisingly, some historians adhered to the perspective of Schardius, maintaining that these set of laws are traced back to 900 B.C. Yet Bynkershoek disagreed with such theory, which could not be traced to any historical origin[15]. The only evidence available to historians was the view of Schardius, and Bynkershoek who affirmed in his book, published in 1703, that the collection was not authenticated, and it is insignificant to state that it dates back to the Greek era or it was part of the Roman law; thus proving the spurious nature of the collection[16]. Pardessus assumed that the collection was an unofficial legislation[17].

Historians were unable to decide the date when these sets had been written, except by speculating. Ashburner, who relied in his research on thirty manuscripts which dated back from the period between the tenth and fifteenth centuries, disputed the notion that the aforesaid set was found in a book which was written between the period of 600 and 800[18]. Whilst Pardessus believed that the set existed during the twelfth century, and came

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[14] *Ibid.*
[15] Benedict, R., "The Historical Position of the Rhodian Law," (1909) 18:4 *Yale Law Journal*, 233 at 225-229
[16] *Ibid.*
[17] *Ibid*, at p. 224.
[18] Ashburner, W., *The Rhodian Sea law*, Oxford, 1909, p. lxxv.

after the Basilica[19]; Reddie presumed that the set was published in the ninth or tenth century[20].

As for the place where it was published, Ashburner said that it was published in Southern Italy, because of the evidence that some parts of the set contain Southern Italy style and character[21]. However, this collection is the production of a comparatively ignorant age; its style, method of collection and subject matter are amply refuting its authenticity[22]. It seems that there are some ambiguities surrounding its origin; an issue which will be explored in the next pages.

2.2.2 THE VARIOUS PARTS:

The set of laws consists of three parts which do not have the same legal significance. In fact, it contains a prologue and a set of two parts. The first part is called maritime law; the second is called the Rhodian Sea law which was derived from the eleventh book of the Digest, and in other editions from the fourteenth book.

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[19] *Ibid*, at p. lxii.
[20] Reddie, J., *op.cit.*, p. 76.
[21] Ashburner, *op.cit.*, at xlviii.
[22] Reddie, J., *op.cit.*, p. 73.

2.2.2.1 THE PROLOGUE:

This document contains the names of six sacred emperors[23]. According to Pardessus, every word in this unique document demonstrates that it is an unauthentic document. When Pardessus observed the controversies on the prologue, he said that such prologue should be considered as an unauthentic document, written during the medieval ages[24]. It is believed that the person who compiled the prologue might either have had two sets of divisions or the second set, and in order to authenticate it, the author of the prologue thought it was necessary to list the names of the emperors who were concerned with either maritime law or Rhodiens. Unfortunately, his miscalculated attempt failed, and his deceit was unveiled.[25]

Ashburner noticed that the prologue did not exist in the oldest manuscripts, and therefore, concluded that this was a strong evidence that it was a work of a later date than the second and third parts[26]. He believed that it was written in Constantinople School of Law in mid-eleventh century[27].

2.2.2.2 THE SECOND PART:

According to Pardessus, this document consists of nineteen sections or chapters. The first thirteen sections are designated for distributing profits among copartners and some issues related to safety on board of vessel.

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[23] Benedict, R., *op.cit.*, at p. 227,
[24] Ashburner, *op.cit.*, at lxxi.
[25] Benedict, R., *op.cit.*, at p. 226.
[26] Ashburner, *op.cit.*, at p. lxxi.
[27] *Ibid.* at p. lxxiv.

Pardessus assumed that it was a set of maritime customs which had been collected in order to guide seamen and mariners[28]. As for the remaining sections, they were incorporated with the rules that deal with non-liability of master regarding the personal effects kept with riders; that is to say, the personal effects which have not been delivered to the master. Moreover, this part deals with the law of jettison and maritime mortgage.

2.2.2.3 THE THIRD PART:

Pardessus suggested that this part was compiled before the Basilica[29], and it is perhaps a private compilation. He mentioned the name Rhodion, in reference to the Rhodion laws; as some manuscripts include such name[30]. This part is known as "The Rhodian Sea Law, extract from the XI book of the Digest." Reddie suggested that although the eleventh book of that work does not deal with nautical affairs at all; and although the fourteenth book contains some relevant titles, this part is the original from which the collection in question has been extracted[31]. Pardessus does not believe in the authenticity of this document, because the eleventh book of the Digest does not incorporate any rules concerned with maritime law. Thus, he said[32] that the writer of this document wrote the maritime customs and some specific maritime agreements in general, which had been extracted from one of the legal sets. He added that this person believed that it was better to

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[28] *Ibid*, at p. lxii.
[29] Basilica is codified provisions, for details see, Lawson, F.H., "The Basilica," (1930) 46 *Law Quarterly Review*, 486-501; second part of the foregoing article is to be found in Lawson, F.H., "The Basilica," (1931) 47 *Law Quarterly Review*, 536-556.
[30] Ibid.
[31] Reddie, J., *op.cit.*, at pp. 72-3.
[32] Pardessus, *op.cit.*, vol. 1, at 220.

write these customs in brief as a point of reference for the seamen. Subsequently, it was thought that naming "the Rhodian Sea Law," may give it an importance. Furthermore, whoever wrote the previous set affirmed that it had been extracted from the Digest.

Pardessus disputed the historians' assumptions concerning the justification of the aforesaid title. Fabrot changed number eleven to fourteen without giving any explanation for such alteration. Book XIV of the Justinian Digest includes two sections which deal with maritime law. However according to Pardessus, a comparison between the document and the book XIV of the Justinian Digest does not allow any room for belief that the aforementioned parts were extracted from the Justinian Digest[33]. Godefroy and Lange affirmed that some legal sets existed besides the Justinian digest and were known as the Digest. However, Pardessus disagreed with them and suggested[34] that no one had heard the historians or legists in any place discuss an official document from the legislations which were known as the Digest except the Justinian Digest.

Ashburner noticed that the RSL never appears by itself in the manuscripts. It is often found in conjunction with other treatises, whether civil or ecclesiastical[35]; a fact which has been considered as an abnormality in the Roman law. However, this is one of the features of Islamic jurisprudence,

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[33] *Ibid.*, at 216.
[34] *Ibid.*, at 217.
[35] Ashburner, *op.cit.*, at xvi.

whose subject matter includes issues on dealings (*mu ʿāmalāt*) and worship (*ʿibādāt*). Ashburner said that some sections of the maritime law contain the Southern Italy character[36]. Historically, there is evidence of the influence of Islamic civilization on the Southern Italy and Sicily since the ninth century[37].

2.2.3 THE CLARIFICATION OF THE INFLUENCE OF ISLAMIC LAW ON THE SET OF RHODIAN SEA LAW:

In order to understand Islamic influence on the set of laws, it is important to shed light on the history of the Southern Italy. At the beginning of the tenth century, Muslims dominated Sicily, Napoli, Bari and some provinces that extended along north of Brindisi on the Adriatic. This part of Italy was considered as part of the Islamic world; and thus, the law which was in force then was the Islamic Law; that is, the *Sharīʿa*.[38]

Sicily was under Arab rule from 902 to 1091, and when the Normans annexed Sicily in 1091 it still remained as part of the Islamic world. In other words, the Normans kept a large number of prominent Muslim elements in its populace. Some of these elements were employed as

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[36] *Ibid.*, at xlviii.
[37] Haskins, C.H., *The Renaissance of the Twelfth Century*, (1927), 283.
[38] Hitti, P.K., *History of Arabs*, London, (1943), 606-7.

consultants by the Normandy kings[39]; others such as physicians and astrologers were employed at the Sicilian court. During the reign of Frederick II over Sicily, Islamic laws were adopted at the Judiciary.[40] For two centuries, Sicily was considered a Christian kingdom, yet Muslims dominated the most important and high-profile jobs. Furthermore, the kingdom had many commercial relations with Islamic countries[41]. However, it is noteworthy that the trade of the country remained to a large extent in the hands of Muslim merchants and the cultivation of the land continued to thrive under Arab men[42].

It is noteworthy that Roger I (died in 1101) retained the old administrative system and kept the Muslim elite. Roger I drew Muslims from the mass of his infantry, patronized Arab learning[43], and shielded Muslim scientists. He also surrounded himself by Muslim philosophers, astrologers and physicians. His court at Palermo had an oriental character rather than a Western one. As for Roger II, his up bringing with his father within in a palace with several Muslim scientists and philosophers, unquestionably earned him a religious spirit and a taste of Islamic culture, and thus, a conviction that the aim of religions is to unite rather than discriminate between them.

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[39] Haskins, C.H., *The Renaissance*, *op.cit.*, at p. 283-4; Hitti, *ibid.*, at p. 607.
[40] Holmes, G., The Oxford Illustrated History of Medieval Europe, (1990), 235.
[41] Haskins, C.H., *The Renaissance*, *op.cit.*, at p. 283.
[42] Hitti, P., *op.cit.*, at 606-7.
[43] *Ibid.*, at p. 607.

The style of Sicilian "Arabophiles" was initiated by Roger I, and later developed during the reign of his son and second successor Roger II (1130-54) and in Frederick II. Accordingly, throughout Roger's II rule the position of Muslims did not change. Roger II himself dressed like a Muslim and was dubbed by his critics as the "half-heathen king".

Furthermore, during his grandson Frederick's II (1215-50) reign, the situation remained the same. Frederick II followed in the footsteps of his father[44]; and due to the extreme influence of Islamic culture on Roger's II and his grandson Frederick II, they were called "the two baptized sultans of Sicily"[45]. He established political and mercantile relations with the Islamic world.

Frederick II ruled both Sicily and Germany and, in addition to holding the title of emperor of the Holy Roman Empire from 1220, became the king of Jerusalem by his marriage in 1225 with the heiress, Isabelle of Brienne. He had a unique personality. He was considered as a point of intersection between two religions and cultures; between Islam and Christianity. This combination was consolidated in Southern Europe, particularly in Sicily and

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[44] *Ibid.*, at 607-8.
[45] Watt, M., "L'influence de l'Islam sur l'Europe Médiévale," (1927) 40 *Revue des Etudes Islamiques*, 12 at 13; Hitti, *ibid.*, at p. 609.

Spain. As an emperor, he was the highest civil authority in Christendom, whilst his life in his palace was comparable to Muslim sultans[46].

The geographical position of Sicily made it the hotbed for various sciences that emerged during the medieval era. Its people consisted mainly of Greeks who spoke Greek, and Muslims who spoke Arabic, and also educated people who knew Latin. The official languages of Sicily were Greek, Arabic and Latin which were also used in the writing of royal decrees.[47]

The Normandy kings made Sicily and Southern Italy as a medium through which Islamic culture came into the peninsula and mid-Europe. Hence, many scientific literatures and literary works were translated during the rule of Roger II from Arabic to Latin. The influence of Islamic culture was tangible in the tenth century and became noticeable in the North of Alps[48].

In reality, the efforts that were dedicated by the Normandy kings in order to bring the Islamic civilization to Europe helped to bring Europe out of the dark into the era of Renaissance. Frederick's II greatest single contribution was the founding of the University of Naples (1224); the first university in Europe to be established by a definite charter, and he, actually, issued a

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[46] Many books were composed about Frederick II, however for more information about his contribution in literature and how he was educated, see Haskins, C.H., *Studies in Medieval Culture*, (1929), 124-147.
[47] Haskins, *Studies in the History of Medieval Science*, Cambridge, 1927, 243 et seq.
[48] Hitti, *op.cit.*, at 613.

decree for that purpose. The works of Aristotle and Ibn Rushd which he ordered to be interpreted were part of the university curriculum. He also supplied the university with several Arabic manuscripts that were interpreted to Latin and Naples languages. Most copies of Naples versions were sent to the Universities of Paris and Bologna[49].

Frederick II promulgated a large number of laws in Latin, which were interpreted into Greek despite the fact that the Greek influence was minor at that time. Such Latin laws were among the reasons which let the Pope Innocent IV deprive Frederick II from the right of absolution[50], and described him as an evil[51]. It was the personality of Frederick II, as well as the Latin law which contained the Islamic Law element which led the Pope to protest against their implementation.

Furthermore, Karl Edward Zacharia published various legal sets that were implemented throughout the medieval ages, among which was the Rhodian Sea Law which was considered as a legislation published by the Normandy kings. Spulber examined the various chapters of the Rhodian Sea Law, and concluded that it conformed to the *Sharī ʿa* principles[52].

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[49] Hitti, *Ibid.*, at 612; Sarton, G., *Introduction to the History of Science*, vol. 2, 575,
[50] Sarton, G., *Ibid.*, at 529.
[51] Holmes, G., *The Oxford Illustrated History of Medieval Europe*, (1990), 236.
[52] Ménager, L.R., "Notes sur les Codifications Byzantines et l'Occident", *Dans varia, Etudes de droit Romains*, 1958, 239-303.

In any case, by drawing the comparison between the RSL and the *Sharī'a* principles, one will notice the common principles among both systems.

2.3 THE RULES OF OLERON:

There is a consensus among scholars that the Rules of Oleron were a codification of decisions made at the maritime courts. However, there was a subsequent dispute over the origin of such courts with regards to location. Were these courts in Oleron off the Western coast of France near La Rochelle, or were they located somewhere else? Several scholars maintained that the courts were in Oleron. Runyan argued that Oleron could not be the original court, stating that the use of the court at Oleron or any other French court was impossible[53]. He, nevertheless, held that justice was carried out according to the prevalent customs[54].

It is said that the Rules of Oleron (hereinafter referred to as "ROO") were the dominant regulations of the early commercial states of Western Europe[55], and also the canonical law for the European Northern seas[56]. Again, these Rules are controversial, because it is impossible to trace the development stages of ROO.[57] There are three main arguments put forward by noted over the origin of ROO. However, there is a common point

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[53] Runyan, T., "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England," (1975) 19 *American Journal of Legal History*, 95, 96.
[54] *Ibid.*, at p. 99.
[55] Flanders, H., *op.cit.*,17; Pineus, K., "Sources of Maritime Law see from a Swedish Point of View," (1955) 30 *Tulane Law Review*, 85 at 86.
[56] Runyan, T., *op.cit.*, at p. 98.
[57] Runyan, T., *ibid.*.

between such argument that the ROO were enacted in the Island of Oleron in the later part of the twelfth century[58].

The oldest manuscripts that included these rules are preserved in Oxford and London[59] and date back to 1266[60]. These manuscripts include thirty five provisions. It seems that the first twenty four or twenty six date back to the first half of the twelfth century[61], which means that they existed during the reign of the Duchess Eleonore. Another eight provisions of the same source related to the same subject seem to be incorporated by Richard I, after few years[62]. Whilst the source of Articles 27 and 28 are unknown and questionable[63], the source of the ROO is controversial, for despite the fact that they are known as the Rules of Oleron, the Island of Oleron was not mentioned in any of its provisions. The local custom of the Island of Oleron, which was written in 1340, includes some rules related to Maritime Law, yet it does not touch upon such Rules. Therefore, if the ROO were deemed to be part of the local custom and related to the Island of Oleron, then the authors of the customs of Oleron would incorporate such rules in their document which was published in 1340. Furthermore, Pardessus held that there are no adequate grounds for regarding the Rules of Oleron in anyway belonging to the Island of Oleron[64].

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[58] *The Black of the Admiralty*, *op.cit.*, vol. 2, at p. xlviii.
[59] Reddie, J., *op.cit.*, at p. 208.
[60] Flanders, H, *op.cit.*, at p. 17.
[61] Runyan, T., *op.cit.*, at p. 98.
[62] *Black Book of the Admiralty*, vol. 1, p. lxx; vol. 2, pp. i-lii; vol.
[63] Reddie, J., *op.cit.*, at p. 208..
[64] *The Black Book of the Admiralty*, vol. 2, p. lii.

Historically, throughout the eighteenth century, the authors stated that these rules were a set of Maritime Rules that were implemented in Eastern Mediterranean during the Crusades. At the beginning of the nineteenth century, English writers argued that these rules represent the laws that were promulgated by their rulers, whilst the French claimed that these rules were implemented in maritime disputes in French harbors which looked on the Atlantic.

Cleirac said that the Queen Eleonor's return from her journey from the holy land coincided with the incorporation of eastern customs in the book of consulates. Hence, she made a draft of these judgments and called it Rules of Oleron to be implemented in the settlement of navigational disputes. When her son the King of England who subsequently became the Duke of Guienne returned from a similar journey from the holy land, incorporated some provisions in the ROO, without changing their original name.[65] British scholars argued that some English writers claimed that one of the English princes collected these rules, and Richard I made some modifications and additions to the rules, then promulgated them in the Island of Oleron when he had returned from the holy land. These English writers relied upon a manuscript that is held at the tower of London[66], yet

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[65] Cited in *Black Book of the Admiralty*, vol. 2, pp xlix-l.

[66] Cited in the *Black Book of the Admiralty*, vol. 2, p. xlvii. Because the writer could not cast doubt on the authenticity of this document, he attempted to cast doubt on the authenticity of that Richard I settled in the island of Oleron and wielded influence on it.

rejected the fact that the Rules of Oleron had been compiled by either Richard I or the Duchess of Guienne[67]. Leibnitz, a German scholar, argued that the ROO had been compiled by order of the duchy of Aquitaine during the reign of his brother in law, Richard I of England. But this argument was dismissed on the grounds that the passage in Leibnitz's works confirms the interpretation put forward.[68]

Unfortunately, there are historical facts concerning the compilation of the ROO which remain undisclosed. Luder attacked English writers when they exposed the ROO, held in the Tower of London. He said that these writers deceived themselves by referring to an old document that had been written in gothic letters. It was them who disputed the story of Richard's I journey to the holy land. This account could have been left dormant at the Tower of London without any encroachment on the historical facts[69].

As it can be inferred from the preceding paragraph, Luder attempted to conceal the information related to the holy land and Richard I. These facts are important for revealing the source of the principles of Maritime Law. If we take into account what was said during the eighteenth century, which it is believed to be more convincing than other arguments, the ROO were implemented in the holy land throughout the Crusades. However, the

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[67] Runyan, op.cit., at p. 98; Flanders, op.cit., at p. 16; *Azuni's Maritime Law*, vol. 1, at pp. 378-80.
[68] *The Black Book of the Admiralty*, vol. 2, p. xlix.
[69] This contention is cited in *the Black Book of Admiralty*, vol. 1, at pp. x *et seq.*

historical documents that deal with trade throughout the Crusades include vital information.

Depping stated the regulations of Jerusalem which were deemed as a French law in the holy land, and urged for the establishment of a commercial court in Saint Jean d'Acre to judge on any commercial disputes arising between Christian merchants and the original citizens (Syrian). The commercial court consisted of beak and six legists (two Christiana and four Syrians). This formation was made because the commercial transactions were mainly between the Syrians or between the Christians and the Syrians, whilst the transactions among the Christians were very few. Moreover, the Syrians knew the customs and habits that were implemented in their country more than the others. Therefore, they were capable of handling claims better than foreigners. This court had the sole jurisdiction on any civil and commercial disputes. Therefore, any dispute brought before any other court was void and unacceptable[70].

Furthermore, Depping related that the French princes permitted the commercial cities that assisted them during the Crusades to establish commercial colonies and these colonies were ruled by consuls from their citizens. Thus, the modern writers consider the ROO as the product of the Crusades[71].

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[70] Depping, G.B., *Histoire du Commerce entre le levent et l'Europe,* (1830), vol. 2, p.24.
[71] *Ibid.*, at p. 23.

Depping mentioned the content of the oath that the consuls should take before undertaking his position. At the end, Depping claimed that the consuls who took the oath did not apply the law of Venice or the Latin law, rather, they implemented the prevalent customs and habits of Sur[72].

Apparently, the Rules of Oleron were merely a collective judicial judgment of the commercial court of Saint Jean d'Acre for the period of the Crusades. It is observed that two third of the commercial court were Syrian who would apply the *Sharī'a* since it represented their customs and habits, and since it had been implemented even before the Crusades[73].

Historians opposed the view that the Queen Eleonora is the one who created the Rules of Oleron, saying the Queen Eleonora could not have collected the ROO during in the heyday of the battles in the East, whilst the rules were not completed. Furthermore, when Queen Eleonora returned to the Island of Oleron, she carried out her long research, which required a qualified person in order to write the first set of the Maritime Laws[74].

It is observed that the Rules of Oleron are not a set of laws issued by the Queen Eleonora, for anyone reading them will realize that these rules are set

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[72] *Ibid.*, at p. 30-31.
[73] Rajab, M. M., *al-Qānūn al-Baḥri al-Islāmi,* (Alexandria: al-Maktab al-Arabi al-Ḥadīth) (1990), pp.34-5.
[74] This is also the view of Pardessus as cited in *the Black Book of Admiralty*, vol. 2, pp. lii *et seq*.

of judicial judgments. It seems that the Queen Eleonora demanded from an arbitrator of the aforesaid court to copy the judgments which had been passed by the court. Therefore, the Queen returned to France with twenty five provisions of the first set of ROO, which were named after the Island of Oleron. Subsequently, her son Richard I went to Syria during the Crusades and obtained the second set of the judicial judgments of the aforementioned court, following in the footsteps of his mother when she had obtained the first set of the judgments. This set enabled him to modify the set that was known as the Rules of Oleron[75].

The purport of the ROO is similar to the principles of the Islamic *Sharī'a* that has been implemented since the eighth century in the East and the West, as we shall see below.

2.4 THE CONSULATE OF THE SEA:

The term 'Consulate of the Sea' (hereinafter referred to as "COS") is derived from the words Consules Maris, which, in the Latinity of the middle ages referred to the practical judges of those commercial and maritime tribunals which were established in the commercial cities of the Mediterranean for the easy and expeditious judgment in several matters[76].

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[75] Rajab, M.M., *op.cit.*, p. 35-6.
[76] Reddie, J., *op.cit.*, at p. 176.

In spite of the substantial defects in its composition, it is considered as the most important set of maritime law of the medieval ages[77]. This is probably partly due to its completion, as it includes concepts which are extracted from various cognate sources; and partly to the ruling position of the Spanish monarchy in the sixteenth and early seventeenth centuries[78]. However, it is argued that it represents all the laws, usages and maxims, it became the common law of all commercial nations in Europe[79].

Nevertheless, dispute was arisen over the nature, history and place of issuing the set. For instance, it is assumed that the Consulate of the Sea is deemed as a set of legislations promulgated by the Spanish rulers. Another argument sees the set as an individual literature. On the other hand, it is thought that it had been written between the tenth and the fourteenth centuries. As for the place where it was written, the most popular view is that it was written in Barcelona, yet the justifications given by those who believe it was written in Barcelona are not convincing. So, where were they written then?

After a thorough examination of the provisions of the COS, it appears that they are identical in most cases to the principles of the Islamic *Sharī'a*, which were implemented in the Mediterranean throughout the period of the

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[77] Holdsworth, W., *op.cit.*, vol. 8, at p. 70; Flanders, H., *op.cit.*, at p. 11.
[78] Holdsworth, *ibid*, at p. 71.
[79] Flanders, H., *op.cit.*, at p. 14.

eighth and tenth century. The next paragraphs explore the controversy over the writing of the COS.

2.4.1 THE PERIOD WHEN THE COLLECTION WAS COMPILED:

Boucher claimed that the Consulate of the Sea was compiled in Barcelona in the year 900[80]. However, it is held that its fundamentals are found in Greek and Roman laws[81]. Other writers reckon that it was composed in the thirteenth century[82]. The COS indicates that a large number of rulers of commercial cities confirmed their recognition of the Consulate of the Sea during the period starting from 1075 and continued until 1270[83].

Reddie adheres to his opposition to the authenticity of the COS, saying that history reveals the contradiction of some claims that the COS include; and other argument should not be given any attention[84]. He further thought that the Consulate of the Sea was revealed within the period after 1340 because it consists of some provisions that were presented in a statute, in thirty three articles, promulgated by Peter IV in 1340[85].

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[80]Reddie, *op.cit.*, at p. 177.
[81] Flanders, H., *op.cit.*, at p. 12.
[82] Such as Capmany, Mornac, Giballinus, and others, see Roddie, *op.cit.*, at pp. 193-4.
[83] Reddie, *op.cit.*, at p. 177; Flanders, *op.cit.*, at p. 11.
[84] Actually, Capmany was the first who showed the document to be a fabrication, Reddie, *ibid.*, at p. 178.
[85] *Ibid.*, at pp. 194-5; Flanders, *op.cit.*, at p. 12.

Blancard sees that the content of the COS endured many modifications and alterations, and it is possible that the modifications may have occurred after 1340. However, nobody can dispute the fact that the COS were written in the thirteenth century[86].

On the basis of the legal tenders mentioned in the COS, Blancard believes that the "Maritime Customs" (the former name of the Consulate of the Sea) emerged during the period between 1266 to 1269. He observed that the Millares[87] (the currency at that time) and the Bezant[88] (1 Bezant = 10 Millares) were used in particular in the provisions of the Consulate of the Sea. They were mentioned fifteen times in the COS texts. Further, the Le Sou and La Livre (Pound) were mentioned twelve times. However, their value were undetermined. Therefore, it is assumed that the Consulate of the Sea were written when the Millarès was the common legal tender. In fact, the Millarès was a sheer imitation of the Square Dirham, as it was minted within the Christian areas in order to facilitate the commercial transactions with Muslims. Due to the original currency, the Square Dirham was last minted in 1269, and it is unlikely that the imitated currency came to surface after 1269[89].

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[86] Blancard, L., *Sur la date et le lieu d'origin du Consulat de la mer*, p. 8.
[87] Millares, a medium-sized silver coin, 455 grams in weight, introduced by Constantine A coin generally used in commerce of the medieval period, originally minted in Montpellier.
[88] Bezan or bezant, a gold coin probably of Byzantinian origin used commonly in Western Europe after the return of the Crusaders.
[89] Blancard, *op.cit.*, at p. 9.

2.4.2 THE PLACE OF WRITING:

In his research on the place where the COS had been written, Pardessus relied heavily on Abbe Gaetano who reckoned that the Consulate of the Sea was composed by Pisans in 1075[90]. Gaetano affirmed that during his period, several written and printed copies were found in various Latin languages. Thus, Pardessus presumes that the origin of the COS is a country that used the Latin language[91].

However, he maintained that Barcelona was perhaps the place where the Consulate of the Sea were written, believing that marine navigation was active in Barcelona during the medieval ages[92].

Despite that, Reddie challenged the foregoing argument, stating that if the COS was compiled in Pisa in 1075, then would they have incorporated regulations less numerous and less complete in the statute which actually promulgated in 1161? He concluded that Gaetano's argument seems to be entirely unjustified[93].

It appears from the aforementioned account that the justifications presented by Pardessus are not convincing. When he presumed that the Consulate of the Sea were revealed prior to the fifteenth century, he relied on the fact that

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[90] Reddie, *op.cit.*, at p. 180.
[91] Pardessus, *op.cit.*, vol. 2, at p.17.
[92] *Ibid.*, vol. 2, at p. 27.
[93] Reddie, *op.cit.*, at p. 180.

several written and printed copies had been found written in Latin languages, which means that the Consulate of the Sea were written in one of these places; that is, where such languages were spoken. Clearly, from the time of editing the COS until the eighteenth century, three centuries have gone by, and this is indicative of the importance of such document in a period when no legislations were available in the field of maritime law[94]. It is likely that the Consulate of the Sea were translated into the Latin languages.

Pardessus selected Barcelona as a place where the Consulate of the Sea was written despite the fact that there were no books or documents in Barcelon which would justify his view. Blancard, who agreed with Pardessus, relied on the text of the COS, and believed that the COS had been edited in Barcelona, because a copy thereof was written in the Catalan language. He wondered that if such copy was the first, then in which Catalan city was written[95]?

As for the first query, Blancard said that during the thirteenth century the customs were written in Catalan language, and concluded that the first copy of the Consulate of the Sea was written in Catalan[96].

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[94] Rajab, M.M., *op.cit.*, p. 40.
[95] Blancard, *op.cit.*, at p. 16.
[96] *Ibid.*, at p. 18.

In reality, this series of arguments cannot prove that the first copy of the COS was written in Catalan language, for all that can be said is that such copy was a sheer translation of a book which had been written prior to the thirteenth century. Even if it is acknowledged that the Consulate of the Sea is a set of customs, that means these customary rules were accepted for a long period. Therefore, it is imperative to search for the origin of these customary rules[97].

In order to know in which city of the Catalan the consulate of the Sea was written, it seemed to Blancard that the answer is to be found in the text of the COS. Article 77 of the COS stipulates that a patron is not obliged to convey belongings and individuals who accompany passengers in the event the latter paid less than twenty Barcelles. By studying the financial regulations that were implemented during the thirteenth century, he observed that the Barcelle was not known as a currency in any where. Thus, he thought that in order to give this enunciation an acceptable meaning it should be modified or complemented without discarding the fact that it is a misrepresentation of one of the currencies that were common in the Catalan, as this set is Catalan. By mentioning Barcelona and Valencia, Blancard assumed that the Barcelle is an abbreviation for the currency that was circulated in Barcelona, namely, Barcelonian pound[98].

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[97] Rajab, M.M., *op.cit.*, p.41.
[98] Blancard, *op.cit.*, at p. 20.

The aforementioned arguments made Blancard think that the Consulate of the Sea includes a provision which refers to a freight as being from Barcelona, a city deemed to be the point of departure. Therefore, the COS was written in Barcelona. Nevertheless, by examining the content of the provision that Blancard relied upon, it appears that such argument contention is not valid[99].

Pursuant to Article 77 of the Consulate of the Sea:

> The patron of the vessel is required to transport the sea chests and the bedding of the merchant, as well as a servant or companion, who is essential to his successful undertaking of the voyage, and must also provide sleeping accommodations for the servant. If the merchant is paying very low freight charges, that is to say, if he is going to Acra, Alexandria, or Armenia, or in that general location, and is paying less than twenty Barcelles in freight charges on his cargo the patron of the vessel is not required to transport his sea chest, nor his servant or companion, unless the merchant pays the proper charges for their transportation; and the merchant himself is not entitled to free accommodations.

Furthermore, Article 78, which is deemed as an interpretation of the preceding Article, stipulates that:

> If the vessel is bound for the Barbary Coast (Africa) or for Spain, or is returning from these locations, and the merchant is paying less than twenty-four Bezants for the freight charges on his cargo, the same procedure should be followed as mentioned above.

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[99] Rajab, M.M., *op.cit.*, p.42.

In fact, it seems that the word Barcelle is not an abbreviation for the Barcelonian Pound. Also, there is no evidence for considering Barcelona as the place of departure.

It is believed that the entire printed copies include the word Barcelle erroneously. Furthermore, a manuscript that is kept at the National Library contains the word Bezants instead of Barcelles[100]. Moreover, Article 78, which is deemed to explicate Article 77, uses Bezants. Therefore, it is unlikely that the author of the Consulate of the Sea used Bezants in Article 78. However, the original Article (Article 77) used dissimilar currency (Barcelles), especially such currency was not known to any financial regulations that were applicable at the time. Clearly, such mistake occurred when one of the manuscripts was copied; that is, Barcelles, rather than Bezants was written[101].

2.4.3 THE ORIGIN OF THE RULES:

2.4.3.1 INTRODUCTION:

Emerigon asserted that a copy of the Consulate of the Sea was written in Catalan language, which he considered an interpretation of an original version. However, he declined to disclose its language or the place where it

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[100] *Ibid.*, at p. 20, margin no. 1.
[101] For details, see Rajab, M.M. *op.cit.*, pp. 42-5.

had been written[102]. It seems that this origin is the literatures of *Sharī ʿa*, which was implemented in Spain between the eighth and fourteenth centuries.

Cleirac said that during the thirteenth century the Eastern maritime customs that were introduced to the COS, were common and authentic all over the Eastern part of the Mediterranean[103]; that is to say, a book with this name existed in the Islamic countries which are located in the Eastern part of the Mediterranean. Given that many Arabic literatures were available in Spain at that time, it is highly likely that the Consulate of the Sea was translated in Spain into the Catalan language[104].

It is noted that Northern Africa and Spain are mentioned in another Article of the Consulate of the Sea, and that is Article 274. Pardessus stated that Capmany, a Spanish historian, indicated that Spain was used to refer to Andalusia[105], adding that the mention of Northern Africa and Spain in two Articles of the Consulate of the Sea may suggest that at the time the COS was written, Muslims dominated the Western and the Eastern coast of Spain[106].

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[102] Pardessus, *op.cit.*, vol. 2, p. 17.
[103] Cleirac, *op.cit.*, p. 2.
[104] Rajab, M.M., *op.cit.*, p.46.
[105] Pardesus, *op.cit.*, vol. 2, p. 299, margin no. 4.
[106] Ibid.

In fact, Pardessus overlooked the fact that the history of Spain during the period from the eighth to the sixteenth century indicated that the Consulate of the Sea is a sheer translation of one of the Islamic literatures. In order to understand the preceding statement, we shall go back to the history of the influence of Islamic culture on Spain which will shed light on the origin of the COS[107].

2.4.3.2 SPAIN UNDER ISLAMIC RULE:

At the beginning of the eighth century, Muslims dominated most of the important cities of Spain. Such control was manifested in the administrative area. In fact, Spain was considered as part of the Islamic world. Spain benefited from the Islamic development widely, as scientists and intellectuals flocked into Spain from the Eastern part of the Mediterranean.

2.4.3.2.1 BEST UNIVERSITIES:

Spain was distinguished from other regions of Europe for the existing of the universities in most of the big cities: Cordoba, Seville, Malaga and Granada. Thus, the curriculum in Cordoba University included astronomy, mathematics, medicine, as well as theology and law. Enrolments in such universities were numerous and the certificates issued opened up the way to

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[107] **Rajab, M.M.,** *op.cit.*, p. 47.

brighter careers in the different subjects.[108] The curriculum of the University of Granada included theology, jurisprudence, medicine, chemistry, philosophy and astronomy[109].

The aforementioned universities were not exclusive to a particular faction of society since their students were Spanish, Muslims and Christians, as well as foreign students who came from all over Europe. Those students carried with them several features of Islamic cultures to the Christian provinces[110].

2.4.3.2.2 LIBRARIES:

One of the characteristics of Greece and Rome was the political assemblies and theatres. However, these assemblies had no place in the Muslim political life. Hence, many literatures circulated in Spain, as they were the best instruments to carry knowledge[111]. Libraries also flourished in every Spanish city. There was also a Book Market held in Cordoba for the first time.[112] The Royal Library in Cordoba which was established by Mohammad I (852-86), and extended by ʿAbd al-Raḥmān III, became the largest and finest library in Europe when al-ḥakam II added his own collections[113].

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[108] Hitti, P.K., *History of the Arabs*, (1934), 563.
[109] *Ibid.*, 562-63.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*

2.4.3.2.3 LAW:

As for law, it is noted that during the Islamic rule in Spain the jurisprudence of Māliki, Shāfiʿi and Ẓāhiri were dominant, with the Māliki jurisprudence as the most dominant.[114] Levi Porovencal stated that adjudication in Umayyad Spain was the field that was related to Northern Africa the most, as Islam dominated this part. During the medieval ages, Spain was the medium through which Islamic thought and knowledge reached Europe[115].

Many encyclopaedias on jurisprudence were compiled in Northern Africa such as Ibn Sahl's (d.1093) Dīwān al-Aḥkām al-Kobra (the Grand adjudicates Digest), which was considered as a significant reference for Spanish scholars. Due to the importance of this encyclopaedia, in the fifteenth century the known scholar al-Wansharīsi relied upon it when he wrote *Kitāb al-Wilāyāt* and *Kitāb al-Miʿyār al-Muʿrib wal-Jāmiʿ al-Muʿrib ʿAn Fatāwa Ahl Afriqia wal-Andalus wal-Maghrib*[116].

It is noteworthy that legal texts that were composed in Spain are regarded as an important source for economic history. The encyclopaedia that was written by Ibn al-Iṣbāḥ ʿĪsa Ibn Sahl in the second half of the eleventh century, was referred to sometimes in order to compensate for any shortage

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[114] O'Ccallaghan, J.F., *A History of Medieval Spain*, (1975), 143; Watt, M., *A History of Islamic Spain*, (1996), 166.
[115] Porovençal, L., *Histoire de l'Espagne Musulmane*, vol. 3, at p. 116, margin no. 2.
[116] Ibid.

in archive, since it answered the scholars' queries about legal matters on several issues concerned with the social life and a number of values that had an impact on life in general. Furthermore, Spanish scholars produced literatures on contracts, particularly on commercial contracts[117].

2.4.3.3 THE INFLUENCE OF ISLAMIC CULTURE ON SPAIN UNTIL THE BEGINNING OF THE SIXTEENTH CENTURY:

The influence of Islamic culture on Spain continued until the beginning of the sixteenth century. The movement of translation of Islamic literature emerged in some provinces, and the *Shar'a* principles were implemented in Christian provinces.

2.4.3.3.1 THE TRANSLATION OF ARABIC LITERATURES:

The translation of Arabic literatures into Latin started from the tenth century. Gerbert d'Aurillac who was the Pope from 999 to 1003, had studied Arabic sciences. At the age of twenty, he spent three years in the Catalan (967-970) when he studied mathematics. Yet, there is no evidence as to his learning Arabic. However, it is worth noting that the Catalan Monastery of Ripoll contained various translations of Arabic literatures.

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[117] *Ibid.*, 242-2.

They owed much to ecclesiastical patronage, particularly to Raymond, archbishop of Toledo, and his contemporary Michael, Bishop of Tarazona for their great role in the interpretation movement. In Toledo, Raymond opened at the beginning of the twelfth century a school that was concerned with translation of Arabic to Latin. Scholars were attracted from various parts of Europe, including the British Isles, such as Michael Scot, Robert of Chester and Adelard of Bath[118]. One of the noted translators was Daminique Gundisalvi who was head of the Segovia. He worked in co-operation with a Jewish known as Ben-Ezra, a Christian convert.[119]

The Italian Gerard of Cremona (died in Toledo in 1187) discovered a huge number of Arabic books in every field, and pitying the poverty of the Latin, learned Arabic so that he could translate them. He translated nearly one hundred books. Many copies, which were translated in Toledo, were taken to Barcelona, Tarazona, Segovia, Leon, Pamplona, to the Pyrenees, especially Toulouse, Béziers, Narbonne and Marseille[120]. By the end of the thirteenth century, Arabic science and philosophy had been transferred to Europe, and the role of Spain as an intermediary was accomplished[121].

After Gerard, Haskins listed Alfred the Englishman, Michael Scot, and

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[118] Hitti, *History of Arabs*, *op.cit.*, at p. 588.
[119] Haskins, C.H., *Studies in the History of the Medieval Science*, Cambridge, 1927, 10
[120] Haskins, C.H., *The Renaissance of the Twelfth Century*, 1927, 285; Haskins, C.H., *Studies in the History of the Medieval Science*, 10.
[121] Hitti, *History of Arabs, op.cit.*, at p. 589, for details about how such science spread over Europe see, Hitti, *History of Arabs*, *op.cit.*, at pp. 588-90.

Hermann the German as the principal translators from the Arabic, who all worked in Spain in early thirteenth century[122].

It appears that Toledo was the scientific capital where many translated sciences took place then were transferred to various parts of Europe. Toledo, which was established in 1250 by the Order of Preachers, was considered as the first school of oriental studies in Europe.[123]

In the thirteenth century, some Spanish provinces contributed to the translation of Arabic literatures[124]. Alfonso X (1252 – 1284), known as el Sabio[125], lived with an environment which was rich in Islamic culture. In 1254 he completed the establishment of the University of Salamanca and established a university in Seville, where many Muslim teachers worked[126].

Alfonso X is considered as a figure that played a vital role in bringing the Islamic culture to Europe. For that purpose, he surrounded himself by scientists in order to accomplish the work that his father had commenced; that is, the translation of Arabic literature into Spanish[127]. He collected the laws that were implemented in the provinces after he had seized them and promulgated a legal set called "El Fuero" and applied it in the provinces that were lawless.

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[122] Haskins, *The Renaissance*, *op.cit.*, at p. 287.
[123] Hitti, *History of Arabs*, *op.cit.*, at p. 588,
[124] Haskins, *The Renaissance*, *ibid.*, at p. 287.
[125] O'Callaghan, *op.cit.*, at p. 359.
[126] Sarton, G., *op.cit.*, vol. 3, at p. 834.
[127] Ibid.

Between 1260 and 1265, he issued the first legal set for Spain called "Las Siete Partidas" which included various details about life in Spain and the prevalent customs. However, it was not officially published until 1338. Afterwards, it became the primary law for Spain and its colonies[128]. This collection included a number of provisions which dealt with Maritime Law.

2.4.3.3.2 THE CONTRIBUTION OF THE INDUSTRY OF THE PAPER-WRITING IN TRANSLATION ACTIVITY IN SPAIN:

One of the most beneficial contributions of Islam to Europe was the local manufacturing of writing-paper. From Morocco the industry passed into Spain in the middle of the twelfth century[129]. Apparently, the industry of paper-writing played a great role in producing massive contributions of translated literatures. After Spain, the art of paper-making was established in Italy (1268-76), also inspired by Muslim culture, namely from Sicily. France owed its first paper-mills to Spain, and not to the Crusaders' return as was claimed. The crusaders were mainly men of action and not learning.[130] It was from these countries that industry spread throughout Europe[131].

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[128] Ibid.
[129] For details about how Muslims known writing-paper, see Hitti, P.K.,*History of the Arabs*, 347.
[130] Haskins, C.H., *The Renaissanc, op.cit.*, 282.
[131] Hitti, P.K.,*op.cit.*, (1943), 564.

2.4.3.3.3 THE APPLICATION OF THE ISLAMIC SHARĪ'A ON CHRISTIAN PROVINCES:

When Alfonso VI seized Toledo, the whole economic and social conditions remained as they had been during the days of Islamic rule. The Arabs stayed and lived there. In fact, they played a great role in carrying the Islamic civilization to the other parts of Europe[132].

It is believed that in Toledo and in other areas that were seized by the Christian during the thirteenth century, Arabic remained as the official language of politics, law, trade, and literature.[133] In fact it was the preferred medium of expression for poets, philosophers and historians[134]. Alfonso VI printed monies that have Islamic character. When the Mozarabs (the Christians who were influenced by Arabic culture) attempted to write in Latin, they used Arabic letters. Pierre I who was the ruler of Aragon (died in 1104), used to write in Arabic.[135]

Julian Ribera suggested that the Justicia Mayer of Aragon who figured so notably in the thirteenth and fourteenth centuries was a Christian imitation of the lord of injustices (*ṣāhib al-maẓālim*), which was implemented during

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[132] Watt, M., *A History of Islamic Spain*, Edinburgh, 1965, p. 150.
[133] Hitti. P., *op.cit.*, at p. 543.
[134] O'Callaghan, *op.cit.*, at p. 159.
[135] Hitti. P., *op.cit.*, at p. 543.

the Islamic reign throughout the twelfth century [136]. The lord of injustices was authorised to remedy abuses of power and spoliation of the people by public officials[137].

However, Provençal believes that Justicia Mayer was borrowed from laws that were applied in the Islamic era, but presumes it was simply a translation of Islamic laws. He stresses that in many occasions, Islamic laws were interpreted in Spain, Arabic legal jargon was included in Spanish language at the same time as the legal rules. For example, Zalmedina (*ṣaḥib al-madīna*) referred to the territorial ruler that was appointed by the authority and given administrative and judicial powers. It is believed that the tasks that were required from Zalmedina were similar to those required during the Islamic rule. After the collapse of Umayyad Empire the system remained applicable in Aragon and Navarre[138].

It is said that Muslims remained living in provinces that were seized by Christians during the thirteenth century. In Andalusia, Aragon and Valencia Muslims constituted the majority of population. The rulers of these provinces were forced to keep Muslims because they dominated trade therein. For each local group, there was a Muslim leader appointed by the ruler, and Muslims were allowed to practice their rites, laws and customs[139].

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[136] Ribera, J., *origenes del Justicia de Aragon*, Saragosse, 1897, cited in O'Callaghan, *op.cit.*, at p. 145.
[137] O'Callaghan, *Ibid.*
[138] Porovençal, L., *Histoire de l'Espagne Musulmane*, vol. 3, at p. 159.
[139] Watt, M., *A History of Islamic Spain*, *op.cit.*, at pp. 151-52.

After a long period of tolerance towards Islam, the year 1499 was considered a fundamental turning point in the history of Spain. This is because when the Cardinal Francisco Jimeneze de Cisneros visited Granada and had discussion with the legists there, he had a negative attitude towards Islam. As a result, he burnt a large amount of Islamic books[140]. However, until 1499 the legists applied the Islamic principles in Spain and there were still many Islamic literatures.

Undoubtedly the Consulate of the Sea were written prior to 1499, and the one who wrote it was inspired by the Islamic law that was implemented at that time in Spain.

We shall discover below how the COS incorporated a number of provisions that are analogous to the principles of Islamic law, and which were applied in the Islamic world which stretched from India to Spain.

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[140] *Ibid.*

3. CARRIAGE OF GOODS:

In order to ship goods from one point to another, the exporter either charters a vessel or delivers it to a shipper. The latter, in turn, takes charge of the entire required procedures from the moment he receives the goods at the port of departure until he delivers it to the consignee at the port of destination. The former contract is called charterparty, whilst the latter contract is known as a contract of bill of lading. It may be said that such distinction is a new conception. However, Muslim scholars have recognized it since the seventh century. It seems that the interpretation of some old document has led some authors to claim that the old legislation recognized such distinction.

3.1 CHARTERPARTY[1]:

3.1.1 THE FORMS OF CARRIAGE CHARTER:

3.1.1.1 VOYAGE CHARTERPARTY:

This is a charterparty by which a vessel is chartered for a specific voyage, for example, from Dubai to Karachi. The possession and control of the ship under this form of charterparty is not transferred to the charterer. This is to say that all the technical and navigational operations as well as the

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[1] Charterparty is derived from '*charta partita*': *Leighton v. Green and Garret* (1613) Godb 204 per Coke CJ, mentioned in *Halisbury's Laws of England* (4th edn.) vol. 43(2), para. 1411 footnote 1.

commercial matters are the responsibility of the shipowner. Yet, the charterer is answerable for a number of functions, risks and costs concerning any loading and discharging operations, including part of the harbour dues.

3.1.1.2 TIME CHARTERPARTY:

Under this form of charterparty, a shipowner places his ship at the disposal of the charterer for an agreed period of time (minimum 11 months and maximum 13 months) or (approximately 12 months). The shipowner retains the possession and control of the ship and, nonetheless, enjoys these rights through the master (*rubbān* or *qubṭān*) and crew (*nūti - baḥḥār*) employed by him; while the commercial operation and whatever related thereto is controlled by the charterer. The latter undertakes to indemnify the shipowner against any liabilities emerging from the master's obeying his command.

3.1.1.3 BAREBOAT CHARTERPARTY:

This type of charterparty is also known as a charterparty by demise. It is described by MacKinnon L.J.[2], as: "An agreement under which possession of the ship is handed over by the shipowner to the charterer, who shall place his servants and crew aboard and sail for his own benefit."

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[2] *Sea & Land Securities v. Dickinson* [1942] 2 K.B.65 at 69.

A recent statement of the hallmarks of a bareboat charterparty can be found in the judgment of Evans L.J. in *The Guiseppe di Vittorio*[3]:

> "What is the demise charter, then? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient rights of possession and control which make the transaction to be deemed as a letting – a lease, or demise, in real property terms – of the ship. Closely related is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement."

Therefore, it means that the possession and control of the ship is transferred to the charterer. It is different from other form of charterparty and as distinct as a contract to hire a self-drive car is distinct from a contract to engage in the services of a taxi.[4] Put differently, the difference between the bareboat charterparty and other forms of charterparty is similar to that between "the contract to which a person is the hiring party of a rowing boat which he intends to row by himself; and a contract in which a boatman shall take him for a row".[5] The demise charterer becomes the owner of the ship in most cases.

3.1.2 THE STATUS OF CHARTERPARTY & BILL OF LADING IN HISTORY:

Dauvillier stated that the concept of charterparty moved between ancient nations, from the Phoenicians to the Greeks, then to the Romans. A

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[3] [1998] 1 Lloyd's Rep. 136 at 156.
[4] Wilson, J., *Carriage of Goods by Sea*, (1998) (London: Pitman Publishing), 8.
[5] *Sea & Land Securities v. Dickinson* [1942] 2 K.B.65 at 69, per MacKinnon L.J..

document states that the freight is payable in advance or at the end of voyage; that is to say, at the point of destination. This means that the liability rules should be altered. For instance, if the freight is payable in advance and the vessel is grounded, the shipper is not entitled to any reimbursement. But, if he does not pay any in advance, then he is discharged from such obligation.[6] However, scholars have found these laws confusing when they attempted to interpret them. According to Dauvillier's interpretation, if the freight is payable in advance and the shipper wishes to charter the vessel, then the contract becomes effective from the moment the vessel is put at the disposal of shipper. However, if the shipper wants to pay the freight at the point of destination and intends to transport his goods according to the contract of the Bill of Lading, then contract is not effective until the goods reach their destination.[7]

In essence, such interpretation is unacceptable due to the fact that the document does not include any specification for such distinction, and this is the reason why it should be said that the above rule is concerned solely with charterparty, and that any other interpretations may lead to modifications and, therefore, to the misrepresentation of the import of historical documents.

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[6] Dauvillier, "*Le Contrat d'affrètement dans le droit de l'Antiquité" Mélange Maury*, 1960, T. 2, p. 97 *et seq*.
[7] *Ibid*, p. 49.

As regard the Greek law, Dauvillier believes that this law fails to discern the distinction between charterparty and Bill of Lading.[8] However, the Roman law cast doubts over the interpretation of some provisions.[9] When Huvelin examined the provisions, he discovered that some modifications had been introduced.[10] Ménager stated that there were not enough documents that indicate the dimensions of the Roman maritime commerce at the Mediterranean in particular, prior to the emergence of maritime transactions in the West during the medieval era.[11] Wilson, on the other hand, was of the opinion that the Bill of Lading dates back to the fourteenth century.[12]

Throughout the eighth century, Islam was rapidly expanding between India and Spain, and there were several factors which contributed to the facilitation of movement of individuals and property. It was against the background of this expansion and movement that the international trade evolved as a new activity. From a legal point of view, commercial relations were intense, and in order to solve the legal problems which emerged during the transactions at that time, Muslim scholars recognised the relevant existing laws of charterparty and bill of lading. These laws these rules are similar to those applicable at present. The medieval legal collections did not recognise the distinction between charterparty and bill of lading. They are, nevertheless, included in the provisions that are similar to Islamic law.

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[8] *Ibid*, pp. 99-100.
[9] Huvelin, *Etudes d'histoire du droit commercial*, p. 113, 183.
[10] *Ibid.*
[11] L.R. Ménager, "Naulum et Receptum Salvam fore," *Revue historique de droit français et étranger*, 1960, p. 179.
[12] Wilson, J., *Carriage of Goods by Sea, op.cit.*, at p. 117.

Muslims have recognised such distinction since the period of the rightly guided Caliphs (*al-khulafā' al-rāshidīn*). This will be clarified in the next pages during my discussion of charterparty and bill of lading.

Māliki scholars recognised charterparty as "*kirā' al-safina al-mu'ayyana bi dhatiha*". Under the terms and conditions of this contract, the parties shall deliver the vessel agreed upon. Note that the shipowner is bound by the contract to put the vessel at the disposal of the charterer; but the shipowner does not guarantee the end of the voyage; that is to say, the arrival of the vessel at its point of destination.[13]

We may distinguish between five principles of charterparty:

The nature of the charterparty.

The fixture.

Shipowner obligations.

Charterer obligations.

Lessor liability.

3.1.3 THE NATURE OF CHARTERPARTY:

Sharī'a recognises certain types of contracts known as named contracts (*'uqūd musammāh*). But, it is possible to create new contracts provided they comply with the provisions of the Islamic law. Generally, when

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[13] Al-Tasawwuli, *al-Bahja fi Sharh al-Tuhfa*, vol. 2, p. 176.

Sharī ʿa deals with certain types of contracts, it is because they are more common than other contracts. Furthermore, unlike the Roman law, Islamic law recognises particular formats of contracts (*shakliyyat al- ʿuqūd*).

That is the reason why we cannot find a chapter or even a section that deals with charterparty; and despite this lack of literature, Muslim scholars managed to cover the issue of charterparty, particularly māliki scholars who studied this form of contract under the name of "*kirā' al-safina al-mu ʿayyana bi dhatiha*". It is believed that despite the fact that this contract includes some elements of a hiring contract, it is likely to be the subject of conditional promise (*ju ʿl*).[14]

On the one hand, this contract contains the essential elements of hire contract, which are:

The object of the contract is a particular vessel, and the parties are required to consign the vessel and explain its equipment clearly.

This contract stipulates that the lessor put at the disposal of a charterer a consigned vessel and that he is not entitled to offer another ship.

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[14] For details about this point see, Noble, N.R., "*The Principles of Islamic Maritime Law*," unpublished PhD, (1988), pp. 98-102.

On the other hand, charterparty is similar to conditional promise (*ju ʿl*), as the moneys in both cases are not payable, unless the contract is accomplished upon the delivery of goods at the agreed destination.

Because the elements of charterparty are not consistent, scholars disagree concerning its principles. Some say that charterparty is the object of conditional promise, because buying its usufruct (*manfaʿa*) is the same as *ju ʿl*.[15] Moreover, the payment is not dividable. This is to say that either the whole payment is taken when the contract is fulfilled or no payment is made when the contract is not accomplished.[16]

Other scholars believe that the charterparty is a form of hire contract and refuse to admit that it is *ju ʿl*. They claim that in the event of grounding, the charterer shall pay the freight up to the distance the vessel approached.[17] A legist maintained that charterparty should always be upon arrival (*ijāra ʿala al-bulāgh*), despite the terms and conditions of the contracts, namely *ju ʿl* and *ijāra ʿala al-bulāgh* which stipulate that the freight is not settled unless the goods are delivered at the destination agreed upon. This is because *ijāra*

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[15] Al-Tasawwuli, *op.cit.*, vol. 2, p. 170.
[16] *Ibid.*
[17] As we it will be mentioned below.

ʿala al-bulāgh and *ju ʿl* are not the same: *ijāra ʿala al-bulāgh* is binding under the terms and conditions of the contract, whereas *ju ʿl* is not.[18]

3.1.4 THE FIXTURE:

3.1.4.1 UNDER THE ISLAMIC LAW:

The contract of a charterparty (the equivalent of hire under the Islamic law) may be concluded by an expression of either *ijāra* or *kirā'* as they are in particular made for such a contract. According to one scholar[19], a charterparty should contain provisions of the name of contracting parties, details of the vessel and the number of crew. Furthermore, a charterparty is deemed valid only if it serves lawful purposes. For instance, if a charterparty involves the carrying of unlawful commodities, such as wine or pork, then it shall be deemed invalid. In addition, a charterparty shall include the country of origin and destination (this is for the purpose of delivery and redelivery of the vessel), and specify the duration if applicable. Moreover, freight, as in the event of voyage charterparty, or hire, as in the event of time charterparty, should be mentioned in detail, in particular with regard time of payment and whether in advance or upon conclusion of the contract. A charterparty shall include a confirmation by the charterer that

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[18] For more details, see Noble, N.R., *op.cit.*, pp. 102-113.

[19] Al-Ghernati A., *Kitāb al-ʿAqd al-Munaẓẓim Lil-Hukkām*, vol. 2, 3.

care has been taken to verify the conditions of the vessel, and a clause stating that the contract has been concluded in the presence of witnesses.

Although the statements included in a charterparty are in writing, they do not necessarily conclude the charterparty. According to the principles of the Islamic law, terms and conditions are binding without necessarily being in writing. Put differently, writing is not a prerequisite to legalise any contract, particularly in commercial contracts. This principle is derived from the longest verse[20] in the *Qur'ān* where Allah says[21]:

> "...but if it be a transaction which ye carry out on the spot among yourselves there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things."

In fact, writing is not required to prove the contract of charterparty, as long as such a contract can be proved by witnesses.

3.1.4.2 UNDER THE ENGLISH LAW:

Charterparty is not a peculiar kind of contract, it is a simply a "parole" contract that can be entered into by word of mouth. This is to say that the law does not stipulate the act of writing as a condition for the authenticity of a charterparty. On this basis, an agreement such as this one may be

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[20] It is called the verse of debt (*Āyat al-Dayn*).
[21] *Qur'ān* II:282.

established orally[22], if it is proved. However, in Cory v. Dorman Long[23], Slesser L.J. was reluctant to accept the probability of the transfer of property by a charter in the absence of means of any kind. He commented:

> "I must confess that I feel the gravest doubts whether it is possible to transfer property by a charter when there is no instrument of any kind. The history of charterparty shows that it is developed in the Law Merchant from indenture and earlier documents, and that charterparty had always to be evidenced in writing."

In summary, the Islamic law and English law share this particular characteristic of charterparty since both systems do not impose writing as a requirement for the authenticity of charterparty contract..

3.1.5 SHIPOWNER OBLIGATIONS:

3.1.5.1 THE BASIC OBLIGATION:

The basic obligation is to put a particular vessel at the disposal of a charterer. If for some reasons, the charterparty for a specific vessel is not put at the disposal of the charterer, then the contract is cancelled, and the shipowner will not be required to provide a substitute ship.[24] However, if the shipowner is not a guarantor, and the journey is not completed due to unforeseen circumstances, then the charterparty is cancelled. If the charterer has not yet paid the freight fees, the parties may agree on a substitute vessel to finish the journey. However if the charterer has paid the

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[22] *Lidgettt v. Williams* (1845) 67 E.R. 727.
[23] (1936) 41 Com. Cas. 235.
[24] Murād, A, *Mawsūʿat al-Qānūn al-Baḥri*, p.45.

freight, the shipowner may not effect the contract. He shall, as a result, return the freight to the charterer, and the parties may conclude another contract to meet their requirement. These provisions must be complied with, otherwise, there may be the case of replacement of debt by another debt, which is unacceptable under the Islamic Law; unless the circumstances do not allow the conclusion of a contract with another party, or in the case of fear of damage to people or loss of goods.

The shipowner shall not be liable for any damage to the goods caused by a defect in the ship. This is because the charterer has presumably verified the vessel prior to the journey.

The RSL adopted parallel provisions. Article 11 states:

> The merchants and the passengers may not load heavy cargoes aboard an old ship. If they do, and the ship is, as a result, damaged or destroyed during its voyage, then whoever loads it shall be liable for such damage or destruction. Upon hiring a vessel and prior to loading, merchants shall seek sailing information from other merchants who have sailed before them. The vessel shall be fully equipped; having a strong sail yard, a staunch at each side, skins, anchors, hemp ropes of high quality, boats in perfect order, suitable tillers, apt sailors, brisk and smart seamen. In short, merchants shall inquire about everything before proceeding to load.

The charterer is entitled to the full use of the chartered vessel, and, apart from the charterer's goods, the master is not entitled to use any space of the ship for carriage, otherwise he shall pay the freight to the charterer[25].

Article 16 of the ROO and Article 22 of the RSL have similar provisions. Article 29 of the ROO, for instance, states that when a merchant charters a vessel to transport wine from Bordeaux or any other port, he is entitled to use the whole vessel from the point of departure to the point of destination; and neither the master nor anybody else, shall, without the consent of the charterer, carry another cargo, except in certain circumstances as laid down by Article 22 of the RSL:

> Let the captain take nothing aboard but water and provisions and the ropes which the ships need when the merchant loads the whole ship according to their written contract. If the captain wishes to put another cargo aboard after loading, then he should be allowed to do it, if the ship has room. However, if there is no room, the merchant may, before three witnesses, prevent the captain and sailors from putting another cargo aboard. In the case of jettison, the captain may have the freedom to load or unload another cargo.

3.1.5.2 THE FAILURE TO CONCLUDE HIS OBLIGATION:

It is believed that the shipowner may fail to put the vessel at the disposal of the charterer at the agreed time or may encounter contingencies or force majeure which debar him of fulfilling his commitment. The question at hand is: Is he answerable in the preceding cases?

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[25] *Ibid*, at p. 69.

3.1.5.2.1 THE FAILURE TO PUT THE SHIP AT THE DISPOSAL OF CHARTERER AT AN AGREED TIME:

If the charterer agrees with the shipowner to charter a vessel from tomorrow to a particular destination, but fails to do so at the agreed time, and the vessel is chartered after two or three days, the charterer is not required to take the vessel.[26] However, if the vessel is put at the disposal of the charterer at the agreed time, then he is not entitled to refuse the charterparty. As regards charterparty time, if the agreed period lasts until the conclusion of the contract, and the ship is put at the disposal of the charterer after the elapse of few days of the agreed time, the charterer is obliged to use the vessel throughout the remaining period[27].

As to the charterer's right to lodge a claim at the competent tribunal, other māliki scholars are of the opinion that the charterer is entitled to lodge a claim at the competent tribunal, and the judge should, in turn, consider the case and pass fair judgments. Generally, a charterer may either cancel the charterparty or permit the charterer to charter a substitute ship; and the shipowner, who is in breach of contract, shall be liable for any additional freight.[28]

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[26] Ibn-Rushd, *al-Bayān wal Taḥṣīl*, vol. 9, pp. 89-92.
[27] Ibn Rushd, *Muqaddimāt*, vol. 2, pp. 637-641.
[28] *Ibid.*

Article 15 of the ROO adopted a similar position to the principles of Islamic law, by permitting the charterer to cancel the charterparty if the failure to effect the contract is caused by the refusal of the master to fulfil his undertaking. If the charterer fails to find another vessel, the master is forced to compensate him for any incurred loss and damage.

Article 260 of the COS is similar to the *Sharī ʿa*:

> If one or several merchants journey to a foreign country and have agreed, under a contract, with the patron of a vessel to come to that country for the purpose of pick up a cargo and deliver it to a specific location, but fail to arrive at the point of destination on the date or within the specified time, the patron shall be liable for any damages, costs, and losses incurred by his negligence.
> Should merchants hire another vessel to replace any vessel, which constitutes the primary object of a contract to pick up their cargo at a specified time, but which fails to arrive at the specified point of destination in the contract, then, they shall pay higher lading fees than what has otherwise been agreed upon with the patron of the first vessel, and if they suffer any loss, then the patron shall be liable for any moneys in excess of the initial costs agreed upon; because the patron of the first vessel agreed upon has failed to arrive at the specified point of destination to pick up their cargo under the terms and conditions of the contract.
> Should the vessel agreed upon initially arrive at the specified point to pick up their cargo after the expiration of the date agreed upon, then the merchants shall not be liable for any incurred loss if they engage another vessel, as the patron of the first vessel has failed to arrive at the specified time agree upon in the contract to pick up their cargo.
> Further, if, however, the first vessel should arrive before the engagement of another vessel by these merchants, although it is past the specified time agreed upon, then these merchants shall furnish the cargo to the first vessel as has been agreed upon. This resolution should be understood in this manner: that the patron of such a vessel shall be liable for all the damages, expenses, and losses the merchants have incurred during the waiting time, if the merchants so wish. Their evidence under oath as to the

amount of such damages, expenses, and losses shall be accepted as valid.

By making a comparison between Islamic law and the preceding provision, the following similarities may be distinguished:

Should the first vessel arrive before merchant engages another vessel, even though after the specified date agreed upon in the contract, then the merchants shall load the cargo aboard the first vessel as has been agreed.

The charterer is entitled to charter another ship, and the shipowner is required to reimburse the charterer any moneys in excess of the amount agreed upon initially if the freight is higher than the one agreed upon, provided a legal action, as maintained by the Māliki scholars, be lodged at the competent tribunal.

If the charterer incurs losses, damages, and expenses as a result of waiting time for the chartered vessel, the charterer shall claim compensation therefore.

3.1.5.2.2 CIRCUMSTANCES WHICH PRECLUDE THE EFFECT OF CONTRACT PRIOR TO LOADING OR DURING JOURNEY:

Māliki scholars hold that freight is not claimable when the time is not convenient for a journey due to fear of enemy or unfavourable weather conditions. Accordingly, if the merchant wishes to terminate the contract, then he may do so. If the fear of the enemy arises in the course of voyage, the vessel should be steered away to a safe location, and should any

merchant wish to discharge his goods, he may do so provided he pays the full freight; and when adverse circumstances persist for a long time and the fear of losing any benefits grow, then the remaining merchants may terminate the contract, unload their goods, and pay the fees of the full freight.[29]

Article 15 of the ROO entitles the charterer to terminate the contract without paying any compensation to the shipowner due to circumstances beyond his control.

In addition, Articles 260, 266 and 285 of the COS are similar to the *Sharī'a* perspective, especially Article 260 which states that if the master is unable to arrive at the loading port due to circumstances beyond his control and without negligence on his part, then he is not liable for any damage or loss:

> If the patron of the vessel with whom the merchants originally agree to ship their cargo, is unable to arrive at the time agreed upon due to certain circumstances beyond his control, such as heavy winds, turbulent seas, or civil authorities, then he shall not be liable for any damages, expenses, or losses incurred by these merchants, as these are not the result of his negligence.

Article 266 stipulates that if the master wishes to terminate the charterparty due to an embargo imposed by the local authority, and the merchant refuses to accept such termination, then he shall compensate the master for any incurred costs:

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[29] Ibn-Rushd, *al-Bayān wal Taḥṣīl*, vol. 9, p. 138-9; Murād, A, *op.cit.*, p.49.

If a merchant or several merchants engage a vessel in a given locality, regardless of the fact that this vessel is to take a cargo aboard at the locality where the agreement is made, or is to proceed to another locality to pick up the cargo, and if during the time the vessel is anchored at the spot where the agreement is concluded, and the local civil authorities impose some restrictions on the departure of the vessel from such locality (let us assume for the moment that the vessel is to take aboard a cargo at the place where the agreement is concluded), and the patron of such a vessel approaches the merchant who has engaged the vessel to terminate the contract that has been concluded in writing, and to free him from the responsibility of carrying their cargo so that he may be able to sail to another locality to look for a cargo that other merchants may want him to carry, and if the merchants who engage his vessel refuse to terminate the contract and free him from his undertaking to carry their cargo, but inform him that he should not worry about this matter, and that they will take care of this legal restriction, and that they are certain they will furnish him with the cargo agreed upon; and if they are able to settle everything and furnish the promised cargo, then they shall nevertheless reimburse the patron for all the expenses he incurred from the date he has requested that the contract be terminated and that he be free from his obligations. The merchants are not, however, compelled to do so as a result of any negligence on their part, but as a result of obstacles inflicted by the authorities, for they have provided him with the cargo as has been promised.

Further, if the vessel proceeds to pick up the cargo at another location, and before the vessel could sail from the place where the agreement has been concluded, and some restrictions are imposed on the vessel, and if the merchants inform the patron of the vessel of their engagement and of the fear that these restrictions should not prevent him from proceeding to pick up their cargo, as they are convinced that the imposed restrictions will neither affect nor delay either their cargo or them personally; and if the patron should, after having been assured by the merchants, should sail for the locality where the agreement with to pick up the cargo has been concluded with the merchants, and if the merchants are unable to supply him with the cargo as has been promised, then they shall be liable for all the damages and expenses incurred as a result of their negligence and the restrictions imposed by the authorities, and for the lading fees he would pay if he carried their

cargo, as it their fault that the patron's cargo has not been picked up.

Article 285 asserts that if the adverse circumstances take place after the arrival of the vessel, and the vessel departs without loading the shipment, the master shall not be entitled to the freight unless he goes back and loads the shipment:

> If a vessel that has been agreed upon by the parties is to proceed to a specified destination to pick up a cargo, and if a violent storm should strike after the arrival of the vessel at the specified destination before the loading of the cargo aboard, and should the cargo be anchored due to the violent storm, or due to the appearance of armed enemy or due to intelligence that the enemy vessels are on the way toward the spot where the vessel is anchored; and if the vessel is forced to sail because of one of these circumstances without taking the cargo aboard in order to return to the place from which it has departed and where it has undertaken to take the cargo aboard, and the patron refuses the pleas of the merchants that he return for their cargo, when the storm has stopped or a safe report is made concerning the movement of the enemy vessels, and he demands settlement of the lading fees agreed upon at the time the contract is concluded, then he shall return for such cargo.

It appears that the common points between the three systems, namely the Sharī'a, the ROO and the COS are the parties' entitlement to the termination of the charterparty under the force of aggravated circumstances. The injured party should be compensated by the other party , even if the other party is the merchant. When such circumstance occurs during the course of voyage, the merchant may unload his goods and the master shall wait for

the merchant until the said circumstances come to an end and until he reaches the point of destination specified in the agreement[30].

3.1.6 CHARTERER OBLIGATIONS:

3.1.6.1 ACCORDING TO ISLAMIC LAW:

The essential obligation is to pay freight in the event of voyage charterparty or hire in the event of time charterparty. As a general rule, the charterer shall pay the fees at the port of destination. However, if the customs fees are due in advance, then the charterer shall pay before the commencement of the voyage. The freight is not payable prior to the arrival of the ship and the unloading of goods, and if the shipment is lost, then the master shall not be entitled to freight.[31]

Scholars disagreed as to whether or not freight is payable in the event where some of the goods are missing. Mālik and Ibn Nāfiʿ maintained that in the event where some of the goods are missing, the master shall not be entitled to freight. However if the journey is coastal, the master may be entitled to the freight up to the distance he proceeds to.[32] Whilst Ibn Nāfiʿ adhered to the view that the charterer shall pay the freight up to the distance that vessel

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[30] Rajab, M.M., *op.cit.*, p. 75.
[31] Murād, *op.cit.*, pp. 56-57.
[32] Ibn-Rushd, *al-Bayān wal Taḥṣīl*, vol. 9, pp.132; al-Wansharīsi, *op.cit.*, vol. 8, pp. 301, 311; al-Namri, *al-Kāfī fi Fiqh Ahl al-Madīna al-Mālikī*, p. 373.

proceeds to[33]; he, On the other hand, maintained that the master may claim the freight for the goods saved when the ship is grounded at the port of destination or when it becomes unseaworthy during the journey. If the charterer charters substitute vessel to complete the journey, then he shall pay the freight to the master for up to distance he has proceeded to.[34]

Article 4 of the ROO asserts that the charterer shall pay the freight at the port of destination, and if the vessel became unseaworthy under some circumstances, then the charterer shall pay freight in proportion to the distance that the vessel has proceeded to:

> If a vessel departs with her lading from Bordeaux, or any other place, and becomes unfit to complete the journey, and the vessel mariners save as much as they can of the lading; and if the merchants require their goods from the master, then he may deliver them if he wishes, and they shall pay the freight fees in proportion to the part of the voyage that has been completed performed, and any salvage costs. But if the master can repair his vessel, he may do so; or he may, if he wishes, send another ship to complete the voyage. And if he has promised the people who have assisted him in the rescue operation, to give them one third or half of the goods saved as a compensation for the risk they have taken in the rescue operation, then the adjudicators of the country of jurisdiction shall consider the hardship they have been through, and shall reward them accordingly, notwithstanding any promises made to them by the parties concerned at the time of their distress.

If the wind prevents the ship from sailing and the ship, however, sails and retreats to its place, as a result, then the master shall not be entitled to the

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[33] Al-Namri, *Ibid*, p. 373; Murād, *op.cit.*, p. 56.
[34] Al-Wansharīsi, *op.cit.*, vol. 8, 306; Murād, *op.cit.*, p. 59.

freight and the charterer may terminate the charterparty and may charter another vessel.[35]

Māliki scholars are of the opinion that the charterparty is terminated once the vessel is impaired. However, they maintain that the charterparty and the liability are not terminated under other circumstances such as sickness, imprisonment or death, in which case, it is the charterer's heirs who shall be liable for any specified freight.[36] However, if the prevalent custom requires that the charterparty be terminated under these circumstances, then the rules of the customs shall be complied with.[37]

3.1.6.2 ACCORDING TO THE MEDIEVAL RULES:

Article 23 of the RSL stipulates that if there is a contract in writing between the captain and the merchant, then this contract shall be binding. However, if the merchant does not provide the full content of the cargo, then he shall provide the freight for whatever quantity remains, as has been agreed upon in writing."

There are many provisions in the COS which stipulate that the charterer shall pay the freight even if he has not been able to use the vessel. Article 102 thereof stipulates that if a merchant makes an agreement with the

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[35] Al-Wansharīsi, *op.cit.*, vol. 8, 310.

[36] Al-Ta'awoddi, *Ḥula al-Maʿaṣim*, vol. 2, p. 178.

[37] *Ibid.*

master of a vessel to ship a specified number of cargos, it makes no difference whether or not he is aboard the vessel at the time of the agreement is made with the patron. If he is later unable to provide the specified amount of cargo agreed upon or lacks the means to purchase the specified amount of cargo agreed upon for shipment, he shall be liable for the lading charges on the amount of cargo specified in the contract, whether or not such amount is loaded aboard the vessel.

Article 83 of the COS distinguishes between the situation when the charterer changes his mind before the loading and after the loading:

> If the merchant who has engaged the vessel to ship his cargo fails to load the cargo aboard the vessel after the time agreed upon for loading has elapsed, the patron of the vessel may obtain the cargo of other merchants in order to carry a full load. If a merchant is no longer a party to the agreement, and this agreement has been made in writing or concluded in the presence of witnesses, or it has been recorded the ship register by a clerk who has taken the oath, after making arrangements to ship a specified number of cargo, the merchant must reimburse the patron of the vessel any incurred expenses and costs related to the proposed shipment of cargo, provided he withdraws from the contract as a party thereto before the loading of the cargo aboard begins.
> If such a merchant should attempt to withdraw from such an agreement after the cargoing of the vessel begins, he shall pay half of the lading charges agreed upon without objection, and the patron shall pay half of the wages due to the crew, provided that the sum equal to half the amount of the freight fees which the vessel would pay if it carries the full cargo, has been paid to the master.

Article 262 stipulates that when the merchant notifies the master of his incapability due to illness, then he shall not compensate the master for any incurred:

If the merchant who engages a vessel promises to dispatch the cargo on a specified day but falls ill and notifies the master of the vessel that due to his illness he will not be able to fulfil his promise, advising him to seek another cargo wherever he can, and further informs him that were it not for his illness, he would comply with the terms and conditions of the contract, and should the patron of the vessel demand a reimbursement of any incurred expenses, the merchant is not required to reimburse him for any such expenses. If the merchant falls ill at the moment he agrees to ship the cargo and wishes to terminate the contract on this basis, notifying the patron within the specified period of time agreed upon and during which the patron may wait for his cargo, then he may do so only if his illness is deemed so severe as to prevent him from executing the contract, and only if he is doing so in good faith.

3.1.6.3 UNPAID FREIGHT – MASTER'S LIEN [38] ON THE CARGO:

According to some Shāfiʿi and Māliki scholars, the master may exercise his right of lien over the goods in order that he may receive of any outstanding freight, as in the case of a buyer who retains the sold item (*mabīʿ*) in order to receive its price. The master makes the shipper partner in goods. Accordingly, if the retained goods incur any loss or damage owing to the shipper's fault, then the shipper shall indemnify the owner of the cargo. If, however, such loss or damage was due to circumstances beyond the master's control, then he is exempt from any liabilities and he shall not claim the freight.[39]

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[38] Wilson defines lien as "the right given to a shipowner to retain possession of the cargo at the port of discharge as security for the payment of freight or other charges." Wilson, J., *Carriage of Goods by Sea, op.cit.*, 286.
[39] Ibn Ḥazm, *al-Muḥalla*, vol. 8, p. 409.

The Ḥanbali and Ḥanafi scholars hold that the master shall not retain goods for the purpose of obtaining freight, because his task is the transportation of goods which is not related to goods. As a result, the entitlement of the cargo owner is linked to the engagement (*dhimma*) of shipper but not to the shipment. Therefore if the shipment incurs any damage or loss, the shipper shall guarantee the indemnity of such damage or loss as in the case of usurpation (*ḍamān ghaṣb*), if he is the usurper (*ghāṣib*) in this case.[40]

In practice, whether or not the freight is payable in advance or upon delivery at the point of destination, the consignee may not take possession of the freight unless the freight due has been acquitted.[41] The COS contains provisions which state that the master may retain the goods in order to obtain freight. This is to say that there are similarities between these provisions and the views of the Māliki and Shāfiʿi scholars. Article 270 stipulates that:

> If the master of a vessel agrees with a merchant or several merchants to carry their cargo, and, therefore, arrives at the specified location to unload the cargo, but there is no specified date or period of time as to when the unloading operation shall take place, and the merchants are required to pay the lading fees, then the patron may refuse to unload any of the cargo and retain it all aboard the vessel until the merchants give him the guarantee that the amount of lading

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[40] Al-Sarakhasi, *al-Mabsūṭ*, vol. 15, p. 107.

[41] *Anglo-Polish Steamship Line v. Vickers* (1924) 19 Ll. L. Rep. 121 at 125; the Merchant Shipping Act, 1894, section 494. For further details see. Colinvaux, R., *Carver's Carriage by Sea*, (1982) (Stevens & Sons), vol. 2, chapter 20; Tetley, W., *Maritime Liens & Claims*, (1985) (Blais: Montreal), chap. 19.

fees laid down in the agreement shall be paid to him on a specified date.

In fact, Article 9 of the ROO allows the master to retain the goods in order to obtain the expenses he incurred for the general average.

Furthermore, Article 275 stipulates that "if the merchants wish to give the master their cargo as payment for the amount due to him from the lading fees, he shall accept their proposal, but he may not force the merchants to give him anything extra, unless there have been any special agreements and promises concluded between the parties concerning this matter." However "if this cargo is to be carried for a set fee, and the cargo consists of various kinds of merchandise loaded aboard the vessel, such as chests of silk, saffron, spices, and other valuable merchandise, and all the other cargo that they wish to leave to the patron in lieu of the lading fees, and its value is less than the value of the amount due to him, the patron may not accept such a cargo if he refuses to do so, as there had been a cargo of higher value aboard the vessel."

It seems that the principle that leave the goods for the master by the merchant when the freight is higher than the value of goods was in fact mentioned by the Māliki scholars[42].

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[42] Saḥnūn, *al-Mudawwana al-Kubra*, vol. 11, p. 137.

3.1.7 THE RESPONSIBILITY OF THE LESSOR:

The lessor may be the shipowner or broker or even the master. If the lessor is the shipowner or broker his responsibility ceases once he puts the vessel at the disposal of the charterer. If anything occurs during the course of the voyage and the vessel becomes unseaworthy, the shipowner is not required to supply another vessel, but he is not entitled to freight. The shipowner is not responsible for the faults of the master, as will be explained below.

3.2 CONTRACT OF BILL OF LADING:

3.2.1 INTRODUCTION:

A Bill of Lading is both a receipt and a contract[43]. As a receipt, it states that certain goods have been received for shipment[44], and as a contract it contains an agreement for the carriage and delivery of such shipment. In fact, it is a symbol of the property described in it, and that is probably the reason why it is believed that the delivery of a bill of lading transferred the property at law[45].

This contract is recognised under the Islamic law as *kirā' al-safina ʿala al-ḍamān*. Under this contract, the carrier is entitled to engage any ship to

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[43] For more details about bills of lading and functions see, Wilson, J., *Carriage of Goods by Sea, op.cit.*, chapter 6.
[44] For great discussion about a bill of lading as a receipt see, Cobbs, T.H., "Bills of Lading Given for Goods not in Fact Shipped," (1898) 7 *Yale Law Journal*, 169-182 and part 2 pp. 219-230.
[45] *Wright v. Campbell*, I Fowel. Ex. 388; *Lickbarrow v. Mason* (1787) 2 Term Rep. 63.

transport the goods agreed upon. However, the carrier is a guarantor for safe delivery to an agreed destination of shipment. Therefore when, in the course of voyage, the vessel becomes unseaworthy the shipper is bound to engage another vessel to continue to its final destination.

This section is divided into the following sub-sections:

The nature of the contract of Bill of Lading.

The content of the contract.

Carrier's obligations.

Shipper's obligations.

Carrier's liability.

Cases of non-accountability.

3.2.2 THE NATURE OF THE CONTRACT OF BILL OF LADING:

Despite the fact that such contract is recognised as *kirā' al-safina ʿala al-ḍamān*, it is not a type of hire contract, since the shipper does not hire a vessel or part of it. Rather, he surrenders consignment to carrier and agrees with him to deliver it to a specific destination. The carrier has the choice to engage any vessel to achieve such contract, yet the carrier is a guarantor for safe delivery of goods. If anything happens and makes the vessel unseaworthy, the carrier is bound to transport the goods on substituted vessel in order to convey the goods to the agreed destination.

It appears that a carrier is bound to achieve performance (*injāz ʿamal*) for the sake of shipper which is the safe delivery of shipment on a vessel to an agreed destination. Thus the contract of Bill of Lading is regarded as a type of contract of piecework (*ʿaqd al-muqāwala*), al-Ta'awwodi calls it as *ijārat khadamāt al-insān*[46].

3.2.3 THE CONTENTS OF THE CONTRACT OF BILL OF LADING:

The contract of Bill of Lading should include the name of carrier, shipper(s), amount of consignment, number of passengers, type of ship, the name of port of loading and port of destination, freight and date of travel[47]. Al-Tasawwuli holds that it is essential to specify in the contract the date and place of departure and arrival, but it is not a requirement to determine the expiry date of journey as this may be affected by climate change such as a severe gale[48]. According to Maliki scholars, a contract of this type and any terms and conditions thereof should be concluded in the presence of witnesses[49].

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[46] Al-Ta'awwodi, *Ḥula al-Maʿāṣim*, vol. 2, p. 180.
[47] Al-Gurnāṭi, *Kitāb al-Munaẓẓim lil Ḥukkām*, vol. 2, p. 3.
[48] Al-Tasawwuli, *al-Bahja fi Sharḥ al-Tuḥfa*, vol. 2, p. 179.
[49] Al-Gurnāṭi, *op.cit.*, vol. 2, p. 3.

3.2.4 CARRIER'S (NĀQIL) OBLIGATIONS:

3.2.4.1 THE CENTRAL OBLIGATION:

The carrier's obligation to transport a shipment is akin to the seller's obligation of guaranteed article in the sense that if the seller loses the article before delivery to the buyer, the former is bound to provide the buyer with a substituted article having the same characteristics as the original article. Therefore, the carrier is bound do deliver consignment to the agreed destination, and if anything happens during the course of the voyage which may render the vessel unseaworthy, the carrier shall convey the consignment on another vessel[50].

According to Malik, the shipper shall pay the freight and he will not be acquitted unless he agrees to convey for pilgrimage purposes. This is because the contract is cancelled, and its purpose ceases as the pilgrimage period is determined[51]. Therefore if the carrier does not furnish a vessel at an agreed time, the shipper shall wait for him. If the carrier subsequently provides the ship, the shipper shall pay freight to carrier, and the carrier shall convey the goods to their destination.

Furthermore, a carrier has other obligations which are as follows:

Obligations during loading and discharge operations.

Stowing (*tasṭīf*).

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[50] Al-Tasawwuli, *op.cit.*, vol. 2, p. 442.
[51] Murād, *op.cit.*, p. 50.

Safeguarding the goods (*ḥirāsat al-baḍā'i ʿ*).

3.2.4.2 OBLIGATIONS DURING LOADING (SHAḤN) & DISCHARGE (TAFRĪGH) OPERATIONS:

Nowadays there are some particular brokers to undertake the loading and discharge operations, but during the medieval ages these operations were undertaken by the crew or people selected by shipper. Generally, the carrier's obligations vary according to the person or firm undertaking these operations. If the contract does not mention who should be responsible for these operations, then the prevailing custom becomes applicable in this case[52]. As a general rule, the master is not answerable for damage sustained to goods during loading and discharge operations unless damage was caused by him or his crew[53].

Article 73 of the COS includes provisions similar to Islamic law. It stipulates that the master of a vessel is required to load and discharge the cargo when he agrees to do so with the merchants. If, however, he has not made such an agreement, the merchants must make arrangements with the sailors for the loading and unloading operations of their cargo. Article 199 stipulates that:

> He who is in charge of a ferrying boat, as well as the men working in the moving of a cargo ashore, after they have

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[52] Al-Wansharīsi, *op.cit.*, vol. 8, p. 301; *Al-Fatāwa al-Hindiyya*, *op.cit.*, vol. 4, p. 455.
[53] See below when carrier's liability is discussed.

agreed to cargo or unload a vessel for a fixed fee or a specified amount of money, are required to accomplish this quickly, properly, and conscientiously.
If the merchants or the patron of the vessel sustain any damages or are forced to incur any costs due to a negligence on the part of those ferrying the cargo by boat in handling the cargo, and should they fail to complete the cargoing or unloading of the vessel pursuant to the provisions of the agreement, the boatmen or those handling the cargo on shore shall be liable for all the costs, expenses, and damages that the merchants or the patron of the vessel who had acted on their behalf have suffered due to their negligence, and they shall reimburse the merchants or the patron without any dispute.

3.2.4.3 STOWING:

3.2.4.3.1 THE POSITION UNDER THE ISLAMIC LAW:

The master is required to stow the goods properly in a way which would prevent goods from sustaining any damage, and properly maintain the vessel in order to avoid any risks. Therefore, if he does so, then he shall not be liable for any sustained damage to goods. [54]

In addition, the Māliki jurists adhere to the view that the carrier is not liable for damage caused by the cutting of the ropes unless he does not tie them properly[55]. But according to Ḥanafi scholars, the carrier is answerable for damage caused by the cutting of the ropes, because they presume that the

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[54] Al-Dusūqi, *Ḥāshiyat al-Dusūqi*, vol. 4, p. 25.
[55] Al-Qarāfi, *op.cit*, vol. 4, p. 11.

goods have not been tied up properly, and this means that the damage has been caused by the carrier (*jināyat yadoh*)[56].

3.2.4.3.2 THE POSITION UNDER THE CONSULATE OF THE SEA:

The COS includes several provisions about stowing goods, which are similar to some extent to *Sharī'a* principles. According to Article 63, the master and the helmsman should not store or order the cargo to be stored in a damp place, or store crates, chests, or bales of cargo in a way that would cause damage thereto. Furthermore, the master of a vessel is responsible to the merchants for improper storage, and if their cargo aboard should become waterlogged due to improper storage, or through seepage in the deck around the openings for the masts, or from leaks in the bottom of the vessel, or through the openings around the steering wheel, or through the anchor chain openings in the prow of the vessel, or by storage of cargo in unprotected areas of the vessel, or, finally, due to the lack of proper pitch and tarring of the vessel, the master, if he has sufficient means, must pay for all of the damage which the merchants may incur due to water seepage.

Article 64 provides that the master of the vessel shall reimburse for the deterioration caused to the cargo aboard the vessel due to dampness caused by seepage through the deck, through the portholes, or due to lack of proper

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[56] Ibn Ismā'īl, *Jāmi' al-Usūl*, vol. 2, p. 176.

protection of the cargo from the elements. The master is not answerable if damage was due to the decks being swamped by heavy seas, but he is answerable if the damage is caused by seepage through the deck which has been appropriately tarred.

Article 66 interprets the meaning of the aforesaid provisions:

> In order to avoid all disputes between the patron and the merchants over these matters, our ancestors (grandfathers), in order to explain what they meant by proper pitching and tarring of the vessel, stated the following: If the deck of the vessel has been tarred up to the deck rail or above it, and also up to or above the openings for anchor chains, the patron of the vessel cannot be held responsible for the damage or water-logging of the cargo, even if the water seeps through the deck.

The reason why the master is not answerable, according to the forgoing provision, is that upon hiring the vessel, the merchants should themselves make sure that the ship is water tight. If they discover a leak in the upper deck of the vessel and do not notify the master about it, then the master cannot be held answerable for the consequences. However if the merchants inform him about it and ensure that he has understood them, then he shall be held liable for all the promises made and obligations undertaken related to the safety of their cargo.

3.2.4.3.3 THE COMMON & DISTINCTIVE POINTS IN BOTH SYSTEMS:

Both *Sharī'a* and the COS do not hold the master responsible when the cause of damage is due to water logging after the master has stowed it properly. In view of that *Sharī'a* includes such damage in the general average[57]. As for the reason why the master is not answerable when the ship is sufficiently tarred, as explained in Article 66, it is noted that this explanation is corresponding to what is recognised under the *Sharī'a* regarding charterparty. Muslim scholars bind the charterer to ensure the safe condition of the vessel and check it carefully. In this case, if he accepts a defective ship then he is not entitled to blame the shipowner for any damages caused by such defect[58].

As far as the option of defect is concerned, if anything occurs to ship which may affect the full benefit thereof, the charterer has the option to annul the contract or affirm it with its defect. However, if he affirms and waives his entitlement to full benefit of vessel he shall pay the full freight. It is presumed when he waives his entitlement to annul the contract he opts to take the possession of the hired object and accepts the defect in it[59].

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[57] As it is explained in chapter six of this study.
[58] It is the application of option of defect, for detail about the option of defect see, Rayner, S.E., *The Theory of Contracts in Islamic Law*, pp. 327-343.
[59] *Ibid.*

The master is a trustee (*amīn*) under the Islamic law and is, therefore, liable for damage to goods. Article 70 of the COS prevents the master from placing the goods of a merchant at the expense of another merchant, and stipulates that the master be answerable for consequences in doing so. Actually the author of the COS presumed that the import of the foregoing provision is ambiguous[60]. He puts forward some assumptions and said that in order to avoid all disputes between the merchants and the patrons of vessels, the grandfathers, who first began to circumnavigate the world, wanted to provide the following justification:

> If all or part of the cargo which the merchant loads aboard the vessel is heavy, and the patron of the vessel takes steps to protect the cargo of only one of the merchants and the cargo of the other merchants is damaged, he will be held responsible for all the damages.
> However, if aboard the vessel there is a heavy cargo belonging to one merchant (and the rest of the cargo belonging to the other merchants is packed in large crates) even though the heavy cargo is stored at lower levels and has been damaged, the patron may not be liable for the damage if the vessel is properly tarred and the water has not seeped through the deck or the portholes to cause the damage. This is because it is proper and it is customary to store all heavy cargo at the lower deck of the vessel. But why is it so? This is in order to make the steering of the vessel easier, as it would be dangerous and harmful to the vessel to store the light cargo requiring large storage place at the lower level and the heavy cargo at the upper level. This would make the vessel top-heavy and susceptible to sinking, and it would be impossible to navigate the vessel properly.
> However, if all or some of the merchants have heavy cargo aboard, the patron should store this cargo on the lower decks proportionally, keeping in mind the way to avoid suffering any losses, as stated above.

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[60] Rajab, M.M., *op.cit.*, p. 99.

In addition Article 237, which deals with stowing crockery aboard the ship, provides that:

> If a patron leases his vessel to merchants who would cargo it with a load of vases employing their own porters, and if one or more of these vases are broken, chipped, or cracked, the patron will not be liable for any such damage, regardless of whether the porters have done their work well or poorly, because the cause of the damage is not negligence on the part of the patron.
> Further, if, on the other hand, the patron of the vessel is in charge of loading such vases aboard, and the porters chosen by him to do this work perform the task well and without any error, and in spite of their care one or more of these vases is broken, the patron shall not be required to pay the merchants to whom these vases belong, any damages; he should not, however, be paid lading charges on the vases that had been broken.
> Further, if at the time the vessel is being loaded, the merchants or their representative are present, and one or more of these vases are broken, the patron of the vessel shall not be responsible for such damage, and the merchants shall not and cannot under any pretence refuse to pay the patron the lading charges due, because they themselves or their representative are present at the time the vessel is being cargoed.
> Further, if any vase has been broken during the loading or storing of such cargo, the merchants shall not be required to pay the shipping charges on the broken vases; but if such vases are broken at the time they are being unloaded, the lading charges shall be paid on such broken vases.

The import of the aforesaid provision is similar to *Sharī ʿa*. Under this law, the master may be liable for damage owing to his negligence or his crew. Therefore, if the shipment sustains damage without any negligence on his part, then he shall not be answerable, and he shall not be entitled to freight. However, scholars hold that the master is not liable for damage to goods if the merchant or his representative accompanies the goods aboard the vessel whether the goods are deteriorated by force majeure or any other cause; as

they consider the goods at the possession of its owner and do not transfer to the master. Mālik said that the charterer cannot blame the master because the owner of foodstuff has been there, with his foodstuff[61]. Ibn Qudāma agreed with this view, saying[62] that when the owner of the goods travels aboard the same vessel as his shipment, or a rider on a beast which also carries the rider's goods, the shipowner and the beast shall not be liable for any deterioration because they are still under the owner's custody.

In addition, the COS stipulates that merchants shall not pay freight for deteriorated goods during loading and stowing. This means that they are not liable for freight if the goods are damaged during discharge[63]. The Ḥanafi scholars hold that the carrier shall be answerable for the damage the goods sustain in the course of the voyage; but he shall not be liable nor entitled to freight if the goods sustain damage at the port of destination[64].

3.2.4.4 SAFEGUARDING THE GOODS:

Māliki scholars count the master as a trustee (*amīn*), and as a general rule, the trustee shall not be liable for damages caused to goods unless he commits an act of transgression. Therefore, in the event of deterioration of

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[61] Murād, *op.cit.*, pp. 69-70.
[62] Ibi Qudāma, *op.cit.*, vol. 5, p. 480.
[63] Al-Wansharīsl, *op.cit.*, vol. 8, p. 306.
[64] Ibn Ismāʿīl, *op.cit.*, vol. 2, p. 176.

goods, the master shall be deemed to tell the truth unless the goods owner can prove otherwise[65].

Nevertheless, in the case of transporting consumable foodstuff, such as salt, vegetable oil, honey and butter, and one of the said foodstuff is damaged or lost, the carrier shall compensate their owners, but may not be liable under the following circumstances: (i) if the shipper accepts the contention of the carrier that he is not responsible for damage[66]; or (ii) if the master manages to establish that the damage is due to circumstances beyond his control; or (iii) if the damage occurs at the presence of the goods owner or his representative[67].

According to the RSL, the custodian (*muda ʿladayhi*) shall not be liable for loss caused by force majeure, yet he shall compensate the goods owner if he is not capable to establish the justification for loss. Hence, Article 12 stipulates that:

> If a man makes a deposit in a ship or in a house, he shall leave it with a man known to him and worthy of confidence before three witnesses. If the amount is large, he shall accompany the deposit with a written statement. If the man who agrees to take charge of the deposit says that it is lost, he must prove how the wall has been broken into or how the theft has taken place and take an oath that there has been no fraudulent act on his part. If he does not show it, let him restore the goods safe as he has once received them.

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[65] Al-Dusāqi, *op.cit.*, vol. 4, p. 25.
[66] *Ibid.*
[67] Al-Ḥaṭṭāb, *op.cit.*, vol. 5, p. 292.

Furthermore, Article 13 provides that the master shall not be liable for loss of personal property that has not been deposited with him:

> If a passenger comes on board and has gold or something else, he shall deposit it with the captain. If he does not deposit it and says 'I have lost gold or silver', his claim is rejected. But the captain and the sailors, and all those on board shall take an oath.

Hanafi jurists say that damage or loss may occur for the following reasons: (i) master's act; or (ii) circumstances beyond control; or (iii) circumstances might be prevented. Under these circumstances, the master shall be liable for loss and damage due to his negligence, yet he shall not be liable for such loss or damage under circumstances beyond his control, such as fire[68]. As for the third reason, as in the case of theft, jurists disagree over the essential obligation that is placed upon the master. Abu Ḥanīfa believed that the fundamental obligation that rests upon the master is the transportation of goods, which is the purpose of the contract, and in contrast, there is the obligation of freight payment. Whereas safeguarding the goods is obligatory as it is only supplementary to the fundamental obligation, there shall be no freight for custody. Therefore, Abu Hanīfa held that the master shall not be liable for loss or damage due to force majeure, either within control or beyond control[69].

Other scholars compare the fundamental obligation on the master with that of the depositor (*mūdiʿ*) in the contract of custody and hire (*ʿaqd al-wadīʿa*

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[68] Al-Kasāni, *Badāiʿal-Ṣanā'iʿ*, vol. 6, p. 264.
[69] *Ibid.*

bi ajr). They consider the primary objective of the contract of affreightment is to safeguard the goods, and safeguarding the goods is strictly related to transport because the latter cannot be achieved unless the master safeguards the goods and passengers. In this case, the master shall be liable for the loss or damage owing to circumstances which might have been prevented. However in defending his view, Abu Hanīfa stated that safeguarding in the contract is obligatory because it is a supplementary obligation not like the contract of custody where safeguarding is a fundamental obligation[70].

Shāfiʿi and Ḥanbali scholars adhere to the view that the master shall be liable for damage or loss if it is his fault, but he shall not be liable when the loss and damage have been caused by circumstances beyond his control[71]. Nonetheless, they distinguish between transport with hire (*ujra*) and free transport in the event of loss or damage due to circumstances which might be prevented. Today, there is no free transport, as the master is liable for loss or damage in the event of transport with hire[72].

3.2.5 SHIPPER'S (SHĀḤIN) OBLIGATION:

The fundamental obligation in this context is the payment of freight. Māliki jurists thought that in the event of contract of bill of lading, freight is

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[70] *Ibid.*
[71] Ibn Qudāma, *op.cit.*, vol. 5, 388.
[72] Al-Shāfiʿi, *al-Umm*, vol. 3, p. 217.

payable in advance[73] on the basis that this contract is of countervalue (*mu ʿāwaḍāt*). Under these types of contracts, the reciprocal obligations, namely carriage and freight, must in theory become due at once. Therefore, when freight is required upon arrival two obligations remain outstanding[74]. However, if parties agreed to transport prior to the date agreed upon, the shipper is entitled to pay part of the freight in advance[75].

If the merchant agrees with the master to bring shipment from another port, and when the master at the destination port, does not find the shipment, he shall be entitled to freight for one way only. Nevertheless, if they agree that the master shall convey goods from one port to another and he does not find any goods at the port which has been agreed upon in the contract, then he shall not be entitled to freight for the reason that, first, the master in the first place has gone to the port that has been agreed upon in order to bring goods, and second, he has not gone anywhere.[76]

3.2.6 CARRIER'S LIABILITY:

A carrier shall, under the bill of lading contracts, convey goods to an agreed-upon destination. In so doing, he actually undertakes several obligations, since his task would be to load, stow and safeguard the goods

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[73] Ibn ʿāṣim, *Tuḥfat al-Ḥukkām*, p. 579.
[74] For details about this point see, Noble, *op.cit.*, pp. 139-142.
[75] Al-Tasawwuli, *op.cit.*, vol. 2, p. 177.
[76] *Al-Fatāwa al-Hindiyya*, vol. 4, p. 470.

during the course of voyage. If for some reasons the vessel becomes unseaworthy, he shall bring another vessel to execute his contract. It is believed that the master's liability commences from the moment of loading and ends at destination when the time of discharge lasts. If a vessel is grounded after time of discharge, the master shall not be liable for loss or damage[77].

As a general rule, the shipowner shall not be liable for any damages unless he is the master; given that the shippers hand goods to master and receive them at the destination agreed upon in the contract. Therefore, in the event of loss or damage they should sue the master because the shipowner is unknown to them and cannot claim anything from him, and the master shall be liable for any such damage or loss. In order to clarify the entire picture of the relations among different parties, we shall explain the relationship between the master and shipowner and the relationship between the master and shippers.

3.2.6.1 THE RELATIONSHIP BETWEEN MASTER & SHIPOWNER:

A master is deemed as a merchant who carries out several tasks, namely navigational and commercial. He may be a partner in commenda or trading

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[77] Al-Tasawwuli, *op.cit.*, vol. 2, p. 179.

partnership (*sharikat muḍāraba*)[78] or even charterer who runs the vessel for his own business. If he is a charterer, then he shall be liable for his actions. It is noted that Mālik did not accept a contract under which the master runs the vessel with the consideration to share the profit. This is because the master is hired with unknown consideration. In fact, the master in this case shall be entitled to customary remuneration (*ujrat al-mithl*) and freight for what he conveys, whilst the shipowner shall be liable for loss and profit.[79] Therefore, the master is the charterer and the shipowner is the lessor. If the master is liable for loss to third party, the injured party shall not be entitled to claim damages from the shipowner. However, because the vessel is at the possession of the master, the injured parties may be compensated from the sale of the vessel. This is in fact one part of the application of the principles of general average.

3.2.6.2 THE RELATIONSHIP BETWEEN MASTER & SHIPPERS:

3.2.6.2.1 UNDER THE ISLAMIC LAW:

Muslim jurists divide servants (*ujarā'*, sing. *ajīr*) into two types: private carrier (*ajīr khāṣṣ*) and common carrier (*ajīr mushtarak*). The former is when he is contracted to perform work for a period of time for an investor (*rabb al-ʿamal*). In this relationship, only the investor benefits from the

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[78] We shall see below how such relation runs, see chapter seven.
[79] Al-Wansharīsi, *op.cit.*, vol. 8, pp. 306-7.

common carrier. As for the private carrier, he is subordinate (*tābi* ʿ) and he is not liable unless he transgresses. On the other hand, the common carrier is the one who is asked to perform particular work. He may be a carpenter, engineer and master. He is independent from the investor and entitled to work for many people, yet he may be liable for loss or damage caused by his negligence or otherwise in the performance of his contract.

Because the master is a common carrier, he may be liable for loss and damage caused by him. Therefore, in order to protect the third party it is presumed that the property at his custody including the vessel belong to him. The injured party who incurs loss or damage due to the master's fault may be entitled to claim compensation from the property at his custody.

3.2.6.2.2 THE POSITION UNDER THE MEDIEVAL LEGAL COLLECTIONS:

As it is recognised under the Islamic law, in the event of loss or damage to goods the injured party may lodge an action against the master but not against the shipowner. Article 26 of the RSL provides that:

> If one of the crew or captain sleeps off the ship and the ship is lost whether during the day or at night, all the damage includes crew members or captains who have slept off the ship, while those who remain on board go harmless. Those who were negligent must compensate the owner of the ship for any damage caused by their negligence…

The same principle is applied in the COS, whereby the master may be liable for damage caused to a third party. Pursuant to Article 186, a master who charters a vessel to the merchants for a fee or accepts a cargo for shipment and stores and transports this cargo on the deck of his vessel without the consent and approval of these merchants, and the cargo stored in this manner is lost or damaged, the master shall reimburse the merchants for any damage they have sustained. Furthermore, Article 227 stipulates that:

> If the patron has anchored his vessel near the shore, in port, or some other place, and the merchants aboard warn and caution him that he should provide a stout hawser to anchor the vessel, and the patron moors the vessel with a weak and unsatisfactory hawser, or if he does not have the proper equipment aboard the vessel to do this, although he has claimed that he would, and the merchants have sustained some damage as a result thereof, the patron of the vessel shall be liable to reimburse them for such damage or loss.
> If the patron lacks the means to pay for these damages, the vessel shall be sold. If the amount realized from the sale of the vessel is insufficient to pay these damages, and the patron has other property, then such property shall be sold to satisfy the merchants …

3.2.6.2.3 ESTABLISHING THE LIABILITY OF THE MASTER:

Once the liability of the master is established, the shippers may be entitled to claim compensation according to contractual liability[80] (*mas'ūliyya ʿaqdiyya*) or tortuous liability[81] (*mas'ūliyya taqṣīriyya*). As the liability of the master is justified, first, for breaching the contractual obligation and, secondly, for his negligence which led to damage or loss to goods, the

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[80] Contractual liability is a legal responsibility for something as stated in a contract.
[81] Tortuous liability is a liability for harm caused by a breach of duty.

master shall guarantee to the shipper compensation for loss or damage which emerged in this case. Generally, a guarantee arises in two occasions: possession (*qabḍ*) or damage (*itlāf*)[82]. However, Abu Ḥanīfa said that the goods owner has no option and, therefore, the master guarantees the value at the palace where the goods have been damaged or lost. According to Abu Hanifa, liability emerges only at the moment of damage (*itlāf*) but not at the time of possession (*qabḍ*)[83].

3.2.7 CASES OF NON-LIABILITY:

Muslim jurists maintain that the carrier may not be liable for loss and damage if such loss or damage is due to unforeseen circumstances or circumstances beyond control. Scholars have cited some cases where the carrier may not be liable, and they are as follows: an Act of God (*āfa samāwiyya*)[84], changing wind (*ikhtilāf al-rīḥ*), the fury of the sea (*hayāj al-baḥr*)[85], fire[86], enemy attack[87] and tear and wear (*ʿajz al-ṭarīq*)[88]. These unforeseen circumstances are included in the Brussels Convention for the Unification of Bill of Lading Rules 1924.

Article 260 of the COS is similar to the provisions of Islamic law. Thus:

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[82] Al-Kāsāni, *op.cit.*, vol. 6, p. 264.
[83] *Ibid.*
[84] Saḥnūn, *op.cit.*, vol. 11, p. 134.
[85] Al-Dusūqi, *op.cit.*, vol. 4, p. 25.
[86] Al-Sarakhsi, *op.cit.*, vol. 16, p. 16.
[87] Ibn Qudāma, *op.cit.*, vol. 6, p. 118.
[88] Māliki school relieve master from liability for *ʿajz al-ṭarīq* or the shortage in bulk or size, Saḥnūn, *op.cit.*, vol. 11, p. 137.

> If one or several merchants journey into a foreign country and entered into an agreement with the patron of a vessel to come to that country in order to pick their cargo and deliver it to a specified location, and if he fails to arrive there on the date or within the period of time agreed to pick up such cargo, the patron shall be liable for all the damages, expenses, and losses suffered by his negligence…
> This should also be construed as follows: If the patron of the vessel with whom the merchants have originally agreed to ship their cargo is unable to arrive on the date specified for arrival, not due to his fault but to some obstacles inflicted by God, heavy winds, turbulent seas, or civil authorities, he shall not be liable for any damages, expenses, or losses incurred by these merchants because these have not been caused by his negligence.

As for the avoidable incidents, this is a controversial issue. Ḥanafi scholars discharge the carrier from any liability for natural casualties that are beyond the control of the carrier. However, he may be liable for damage due to a defective means of transport in which he interferes and which he may avoid[89]. Generally, the carrier may be liable if the shipper proves that the negligence of the carrier is a navigational error, technical maintenance of the vessel, error in stowing or storing which have led to damage of goods[90].

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[89] *Al-Fatāwa al-Ḥindiyya*, vol. 4, p. 502.

[90] Al-ʿAbderi, *al-Tāj wal Iklīl*, vol. 5, p. 427.

4. THE LAW OF COLLISION (*AL-TAṢĀDOM AL-BAḤRI*):

As vessels are usually vulnerable to various types of contingent accidents during their journey, particular rules were enacted to cover such unforeseen incidents. Not only a vessel is vulnerable to these accidents but also its cargo. Maritime accidents as collisions and casualties that endanger the safety of ships, and which require salvage services. Furthermore, the invested moneys in the journey may be vulnerable to loss; the so-called loss should be borne by the parties involved in the maritime adventure.

The present chapter discusses collision at sea, and the following chapters explore the law of salvage and the general average.

4.1 DEFINITION:

Collision is described as a violent encounter of one moving body with another[1], and it dates back to mankind's first use of sea. The aftermath of a collision is extremely important in the sense that it causes loss or damage to property, and death and/ or injury of the crew and men on board the vessel.

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[1] *Wright v. Brown* (1853) 4 Ind. 95, 97. Strictly speaking, the word "collision" means the impact of two ships both moving, and is differentiated from allision, which designates the striking of a moving ship against one that is stationary. In broad sense, collision embrace allision, and perhaps other types of encounters between ships, and between a ship and other floating objects, though non-navigational, see Healy, N.J. and Sweeney, J.C., "Basic Principles of the Law of Collision," (1991) 22(3) *Journal of Maritime Law and Commerce*, 359 at 359.

According to the Roman law, collision is a normal incident, and, thus, no particular rules are prescribed. Therefore, the liability in the event of collision is addressed to the civil law[2]. The causes of damage (i.e. collision) according to the Justinian Digest (hereinafter Dig.) may be chance, accident, or the free acts or omissions of reasonable human beings (Dig. 9 title.2 s.5:2). If the *damnum*[3] is caused by the just exercise of a right, it is indirect, but in any other case, it is direct. A man may not be liable for compensation for indirect loss or damage (Dig. 39 title.2 s.26; 47 title.9 s. 3:7); nor for any direct damage, if neither *dolus* (wilful) nor *culpa* (negligence) can be attributed to him, as if he were mad (Dig. 9 title.2 s.5:2, 30:3). As for the former case, each vessel shall be liable for any damage and loss. As for the latter case or *damnum injuria datum*[4], it is the party that has incurred any loss or damage that is entitled to claim compensation by the *lex Aquillia*[5], also termed *Aquilian* law, (Dig. 9 title.2)[6].

Under Islamic law, scholars use analogous legal rules for both transportation by sea and transportation by land. This means that the legal rules that are applicable on beast-of-burden transportation are also applicable on carriage

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[2] Assburner, *op.cit.*, at p. cclxxxv.

[3] *Damnum* signifies generally any loss or damage which a person has sustained in his property (*damnum datum, factum*), or damage which he has reason to fear (*damnum infectum*) (Dig. 39 tit.2 s.2). *Damnum* actually done is generally called *damnum* simply. The liability to make good a loss is praestare damnum. Garner, B, *Black's Law Dictionary*, (7th edn, 1999) (West Group: St. Paul), 398.

[4] The wilful or negligent damage to corporal property. Garner, B., *Black's Law Dictionary*, (7th edn., 1999) (West Group: St. Paul), 398.

[5] A celebrated law generally regulating damages done to property, including compensation to be paid for injury to another's slave or livestock. Garner, B, *ibid*,920.

[6] http://www.ukans.edu/history/index/europe/ancient_rome/E/Roman/Texts/secondary/SMIGRA*/Damnum.html

by sea, save for some exceptional cases concerned with the character of the means of transport. An examination of the encyclopedias of Islamic jurisprudence shows that the law of collision at sea applies the same principles that are applied to casualties and accidents involving beasts of burden. This is to say that if a beast of burden goes wild and injures a pedestrian, it will be presumed that it is the owner to blame in such an incident for not guarding and controlling his beast, and shall be liable for compensating the injured party. (i.e. the pedestrian)[7]. In applying the preceding rule on collision at sea, the vessels are governed by the doctrine of liability of the act of object.

There are two aspects in this point in the Islamic jurisprudence:

The Māliki and Ḥanbali jurists deny the application of the principle concerned with the liability of the beast's act on collision at sea. Consequently, the master shall not be liable unless involved in an incident where it is proved his fault and that fault has led to accident. However, the Shāfi'i scholars accept the notion of applying the rules of beast's act on collision at sea. They consider the master as a guardian and, therefore, liable for compensation for damage and loss caused by vessels regardless of whether or not he has been negligent.

The Rhodian Sea Law and the Consulate of the Sea include rules similar to those adopted by the Māliki and Ḥanbali jurists. It appears that the Rules of

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[7] for details sea, Al-Ghirani, M.M., *The Law of Charterparty with Particular Reference to Islamic Law*, unpublished PhD thesis, Glasgow College, (1990), pp. 280-293.

Oleron are compatible with the Shāfi'i scholars' views with respect to compensation for damage and loss resulting from a collision regardless of whether or not it is the fault of the vessel's master.

There are two principles as to the error for loss or damage in the case of a collision at sea, namely:

The liability for established error.

The liability for the act of the vessel.

4.2 THE LIABILITY FOR ESTABLISHED ERROR (AL-MAS'ŪLIYYA 'AN AL-KHAṬA' AL-MATHBŪT):

Muslim jurists have different categories for collision, not to mention, voluntary, unintentional; that is, regardless of its status and incompetence. The various categories are as follows:

4.2.1 WILFUL OR INTENTIONAL ('AMDI) COLLISION:

It is a deliberate collision caused one party or both parties for the purpose of possessing the goods on board the vessel. This is to say that one party or both of them intend to harm the other party. In a collision of this type, both parties shall be liable for any damage or costs, and may be prosecuted under the criminal law.

In other words, they shall be liable to remedy the physical and incorporeal damage following any such collision. Moreover, if one of them dies, the other party shall be liable for his action, but if both die, there would not be any ground for criminal liability[8]. Al-Bahūti maintains that both masters of ships are parties to an agreement, and shall be liable for any loss or damage caused to the vessel or people therein, as their principal responsibility is to guarantee safety[9]. If one or more people die as a result of such collision, both masters shall pay blood money (*diyya*) to his/her heirs. The preceding compensation is calculated on the basis that the detrimental act has been intentional (*ʿamdi*) or semi-intentional (*shibh ʿamdi*). A collision is intentional if it is fatal. It is like throwing someone in the middle of the sea with no chance of escape, and he sank as a result. However, a collision is deemed semi-intentional if it is not fatal as in the case of a collision near the shore. It is like throwing someone in shallow water, and he sank despite the fact that the water is not deep.[10].

It is noted that both masters are jointly and severally liable to compensate a third party. Therefore, under the law of collision, the victim in such a collision may claim compensation from both of them. As it is the intention of both parties to kill each other, the family of the murdered party shall only be entitled to half of the blood money (*diyya*). But if both parties die, each

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[8] Ibn Qudāma, *al-Mughni*, vol. 12, p. 547.

[9] Al-Bahūti, *Kashf al-Qināʿ ʿalā Matn al-Iqnāʿ*, vol. 4, p. 130.

[10] *Ibid.*; Ibn Qudāma, *op.cit.*, vol. 12, p. 551.

one's family shall be entitled to half of the compensation from their inheritance.

4.2.2 COLLISION DUE TO FAULT (KHAṬA'):

It is observed that whilst the Māliki jurists use the term "fault" to describe this type of collision; the Ḥanbali and Shāfiʿi jurists use the term "negligence," which includes fault, carelessness and want of care. Ibn Qudāma said that negligence is an instance where the master is capable of controlling the vessel and avoiding collision with another vessel, but did not do so, or where the master is capable of steering the vessel away to other direction to avoid collision, but did not do so, or did not furnish the number of sailors, ropes, and other things such as anchors and timbers needed to maintain the stability[11] of the vessel, or did not exercise the ordinary maintenance[12]; that is to say, he failed to meet the requirements to provide a seaworthy ship. Shāfiʿi jurists, nonetheless, maintain that negligence occurs when both masters are negligent of their machines, or are capable of controlling them, but have not done so, or have sailed in strong winds when the vessel should not have sailed[13].

Collision may occur because of fault of one party or may occur because of corporate actions of both masters.

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[11] Ibn Qudāma, *op.cit.*, vol. 12, p. 547.
[12] Al-Zuhayli, W., *al-Fiqh wa Adillatoh*, vol. 6, p. 378.
[13] Al-Nawawi, *Minhāj al-Tālibīn*, vol. 17, p. 353.

4.2.2.1 FAULT ATTRIBUTED TO ONE PARTY WHEN LED TO COLLISION:

Muslim jurists hold that when a master of one ship commits a fault which subsequently leads to collision, and his liability is established, then he shall pay the damage sustained by the vessel, as well as the people and goods on board.

As for the case of collision when one vessel is stationary at its anchor, and the other is moving, Ḥanbali jurists adhere to the view that the latter vessel shall be responsible for such collision. Ibn Qudāma stated that if a vessel is moving and collides with another anchored vessel, then it is the former which is held responsible for such collision, provided that there are grounds for its master's negligence, otherwise the master shall not be held liable for any damages.[14]

Put in a different way, the master shall only be liable for damages if he has been negligent, but if the collision is caused by a force majeure, then he shall not be liable for any damages.

As for a head-on collision, Ibn Qudāma held that when the master of the vessel heading downwards is negligent, then he shall be liable for any damages. This is because the vessel going downwards descends from a high

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[14] Ibn Qudāma, *op.cit.*, vol. 12, p. 546, 550.

point towards the vessel going upwards. In this situation, the vessel heading downwards is deemed as the moving vessel and the vessel heading upwards is deemed as the anchored one in the event of collision[15].

If both vessels sink, then it is the vessel heading downwards which shall be liable for damages. However, if the vessel heading upwards has been negligent; that is to say, the master is capable of avoiding the vessel heading downwards; and the vessel heading downwards is incapable of avoiding the vessel heading upwards, then it is the master of the vessel heading upwards who shall be liable for damages.[16]

The Māliki jurists believe that the master of the ship shall be held responsible for collision if he is capable of controlling the vessel, but has not done so to avoid sinking or falling a prey to the enemies' capture or even sailing during night without lights. They maintain that as the master has been capable of avoiding collision, and has not done so, then he should burden the consequences of such act[17], because he is a guarantor under the appropriate agreement[18].

If damage occurs at night, then the owner is the guarantor (*ḍāmin*), and is thus liable for any damages caused by his beast's actions. This principle is

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[15] *Ibid.* at pp. 548-9.
[16] *Ibid.*
[17] Al-Kharashi, *op.cit.*, vol. 5, p. 254.
[18] Mālik Ibn Anas, *al-Mudawwana al-Kubra*, vol. 6, p. 446.

equally applicable on vessels. However, if damages take place during daytime, then the owner shall not be liable[19].

As for compensation for damage in the event of a collision, shāfi'i jurists hold that if both ships are owned by their masters, then it is the owner responsible for such collision who shall be liable; and the other party may claim compensation therefrom. However, if both vessels are owned by others, the negligent party (master) bears the entire loss[20], that is to say, he is liable for both vessels and their contents.

But is the owner of the damaged vessel entitled to claim compensation from his master, whilst he is not responsible for the damage he has sustained? There are two different views: (a) The master shall be liable for collision even if it were not his fault, and the shipowner may claim compensation for the damage he has incurred. Subsequently, the master may also claim compensation from the owner of the ship which has been at fault. (b) If it is not the fault of the mater, then the latter shall not be liable, and therefore, the shipowner may not claim any compensation for damages from his master[21].

The RSL deals with the issue of collision in one occasion, namely Article 36. It summarizes the liability of collision caused by fault on the part of

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[19] This is the view of most Muslim's jurists. See, al-Zuḥayli, W., *op.cit.*, vol. 6, p. 370.
[20] Al-Nawawi, *op.cit.*, vol. 17, p. 359.
[21] *Ibid.*

either party, and distinguishes between the collision that takes place during daytime and that which occurs at night. When the collision occurs at daytime, the master of the moving vessel shall be liable for any damage caused to the other stationary vessel: "A knocks against B (the anchored vessel) during daytime. All the damage regards the captain of A (moving vessel or in full sail) and those on board. The cargo of A also contributes." However, if the collision occurs at night, the one who has been negligent shall be liable for damages, as he has not taken the necessary precautions to avoid such accident: "A knocks against B at night. Unless B gives notice of his presence, A incurs no liability."

The said Article is similar to the view of Muslim jurists who hold that it is the master of the vessel in full sail which shall be liable for damages caused to the anchored or stationary vessel[22].

4.2.2.2 COLLISION IN THE EVENT OF MUTUAL FAULT (KHAṬA' MUSHTARAK):

If a collision has been established to be the result of negligence on part of both masters, then they shall be liable to repair any damage resulting from such collision. Muslim jurists were of the opinion that each master should be liable for any damage he has caused. However, Muslim scholars disagreed as to how the liability is to be allocated.

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[22] See p. 153.

Ḥanbali and Ḥanafi scholars were of the opinion that each master should be liable for the damage he has caused. This is to say that each master shall be liable to repair the entire damage caused to the other ship, including goods and people, as such damage has been caused by his action[23]. The liability shall be in proportion to his fault. The Māliki and Shāfiʿi scholars adhere to the view that half of the entire damages, whether caused to the ship or goods or even people on board, shall be divided between them equally because the damages have been caused by both of them[24]. If a collision causes death to people, each master shall be liable to pay half of the blood money of these people[25].

The aforesaid conclusion is in contrast with the case when the collision is caused intentionally, the masters shall be jointly and severally liable, but in the event where both masters are to blame, the masters are not jointly and severally liable for the consequences of collision.

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[23] Ibn Qudāma, *op.cit.*, vol. 12, p. 545.

[24] Ibn Qudāma, *Ibid.*, vol. 12, p. 546; also, al-Shāfiʿi, *Al-Umm*, vol. 6, p. 86.

[25] Ibn Qudāma, *Ibid.*, vol. 12, p. 546; also, al-Shāfiʿi, *Al-Umm*, vol. 6, p. 86; al-Zuḥayli, *op.cit.*, vol. 6, p. 379.

4.2.3 COLLISION NOT RESULTING FROM FAULT OF PARTIES:

A collision that is caused by severe winds or other natural causes, with the incapability of both masters to avoid collision is known as a compelling collision or collision due to force majeure. However, if it is established that the cause of collision has not been negligence on the part of either party or force majeure, this type of collision is known as inscrutable collision.

4.2.3.1 COLLISION DUE TO INEVITABLE EVENTS (QAHRI):

Maliki and Ḥanbali scholars suggest that the master shall not be liable for any damages due to circumstances beyond his control, that is to say collision due to force majeure, if he could not avert the consequences, as in the case when a thunderbolt strikes a ship and subsequently burn it[26] or due to strong wind. Therefore, a collision of this type is not deemed as compelling when one of the masters has been capable of avoiding it. Mālik said[27] that if the wind overcomes those who own ships (*ahl al-sufon*), they shall not be liable for the damages caused by such collision, except in a case where they have been able to overcome the wind but have not done so[28]. Therefore, the injured party incurs the consequences but shall not be entitled to claim any damages from other parties.

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[26] Ibn Qudāma, *Ibid*., p. 549.
[27] Mālik, *op.cit*., vol. 6, p. 446.
[28] Sahnūn, *al-Mudawwana al-Kubra*, vol. 11, p. 134.

4.2.3.2 COLLISION DUE TO INSCRUTABLE FAULT (KHAṬA' MUSHTABAH FĪHI):

This collision occurs when the cause of accident is unknown. As mentioned before, in order to acknowledge the collision as due to force majeure, the master of the ship that caused damage should establish that he exercised due diligence to avoid collision. In other words, when the master of the injured vessel fails to establish fault or carelessness of the master of the other ship, and at the same time the latter fails to establish the case of inevitable force majeure, such collision is considered as in-doubt collision.

In deciding who is negligent, Ibn Qudāma said[29] that the master should have the final say as he is under oath and trustworthy. In other words, he is in the place of a bailee. Therefore, in the event of doubt of the fault of any parties and failure to establish their negligence, such accident is deemed to have been caused by a force majeure. Hence, the injured parties incur the loss and damage and shall not be entitled to claim any damages[30].

The COS contains four provisions that deal with collision at sea, the content of these provisions is analogous to the views of Māliki scholars. In fact, as explained above, the Māliki jurisprudence was prevalent in Spain during the

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[29] Ibn Qudāma, *op.cit.*, vol. 12, at p. 549; also, al-Nawawi, *al-Majmūʿ Sharḥ al-Muhadhdhab*, vol. 19, p. 180.
[30] Ibn Qudāma, *Ibid.*, p. 550.

Islamic reign, at the beginning of the medieval ages and particularly in the thirteenth and fourteenth centuries.

Article 200 states:

> If behind the vessel that first drops the anchor in a port, at a sand bar, shore, or pier, another vessel drops the anchor, it should be moored in such a way that it will cause no damage to the vessel that first drops its anchor at that point. If in mooring it some damage should be caused to the first vessel, the owners of the second vessel shall, indisputably, be liable for the damage.
> However, if the second vessel docks in during a storm and cannot be moored without causing damage to the first vessel that has been moored, compensation shall not be paid for the damage caused since such damage has not been caused by negligence. In case the damage caused under such circumstances, then the case shall be submitted for arbitration to people with deep knowledge of the art of sailing.

Article 201 provides that:

> A vessel that reaches a port, a pier, or a shore and drops its anchor and causes some damage to a vessel that arrives or moors later, shall not be liable for repairing the damage, if such a vessel is short of mooring ropes, or if it has used up all the mooring lines it had aboard and does everything else possible to avoid an accident, or if the vessel has been moored at a place where it could not under any condition borrow or rent any mooring lines, and if the storm buffeted it so violently that the vessel could not be anchored properly. If under such circumstances it has caused some damage to another vessel, it shall not be liable for repairs aboard the damaged vessel.
> On the other hand, if this vessel had lines that were borrowed or rented, or if it was located in the area where the patron can procure such lines, or, finally, if those aboard the vessel that reached the anchorage later, warned those aboard the vessel that had arrived earlier that they should moor their vessel more solidly in order that it would not cause damage because the weather was inclement and there was danger of a storm, and the crew of the vessel moored earlier replied that they would not add any more

anchor lines to make the vessel more secure, and there came up a storm of which the crew of the second vessel to reach the port had warned the crew of the first vessel that had dropped anchor in the port, and the second vessel was damaged, the first vessel shall be liable for all the damages it caused, ...

Article 202 stipulates that:

> If a vessel is the first to drop anchor at some specified place, a vessel that reaches this place later must drop anchor in such a way that it will not cause any damage. If, however, it should cause some damage, it shall be liable pursuant to the provisions of this Article.
>
> The above shall be interpreted in the following manner: The first vessel to drop anchor will not move its anchor or its mooring lines inward or outward of the shore after the newly arrived vessel has been moored. If the first vessel moored should move its anchor or its mooring lines after the arrival and anchoring of the second vessel, and suffer some damage, the vessel that was moored later shall not be liable for all but for only part of this damage, because it was the first vessel that moved its anchor or its lines either inward or outward of the shore.

According to Article 203:

> If one, two, or more vessels enter the port simultaneously, or anchor at a pier, shore, or some other spot, each of the vessels must drop anchor at such distance from the other vessel that under no circumstances could they cause damage to one another.
> Further, if it should happen that a storm develops, each vessel must be anchored and moored securely and staunchly, and each vessel must take all possible steps in order to prevent damage to any of the vessels moored. If it should happen that during a storm one of the vessels lacking enough proper equipment collides with another vessel and causes damage, but the vessel that lacked some essential equipment had made every possible effort to be safely moored, and the equipment it had on board was of good quality and sufficient to take care of the needs of such a vessel or even a larger vessel, such a vessel cannot be called upon to pay the damage to the party that suffered it, as the damage did not result from the negligence of the

vessel that lacked some equipment for the simple reason that the damage did not result due to the negligence of the vessel that lacked some equipment, and also because the party to whom the vessel belongs did everything in his power to moor the vessel securely, and even though there was lack of some equipment, the equipment that was available on board was sufficient and of good quality, and capable of mooring the vessel if that size and even a larger vessel.

Therefore, for reasons listed above, such a vessel will not be required to repair the damage it has caused to another vessel. However, if the patron of the vessel aboard which, because of lack of equipment, did not moor the vessel strongly enough as he should have, or if the mooring lines aboard it were not sufficient to anchor a vessel of that size or even a smaller vessel, and because of this the vessel had caused some damage to another vessel, the master of such a vessel will be required to pay for all such damages suffered by any vessel due to the poor quality or weakness of the mooring lines that the former vessel had aboard.

A close examination of the said provisions reveals that they contain the following fundamental rules:

1) Each master must take all possible measures or steps when he anchors and moors his vessel in order not to cause any damage to other vessels.

2) The master shall not be liable for any damages resulting from a violent storm, but with the condition of taking all possible measures in order to control the vessel and of ensuring that the vessel is fit to encounter the perils and any incidental risks. In other words, he should ensure that the vessel is seaworthy enough to meet and undergo the sea perils at anchoring and mooring.

Muslim jurists consider the master of the vessel is at fault or negligent and, therefore, responsible for the consequences of collision if he fails to supply

equipment, qualified crews and other essential materials that are important for seaworthiness. On the other hand, the master is not exempt from accountability for collision due to storm unless he proves that he has taken all possible steps to avoid collision.

4.3 THE LIABILITY FOR THE ACT OF THE VESSEL (FI 'L AL-SAFĪNA) AND THE RULE OF DIVISION OF LOSS:

Muslim scholars adhere to the view that in case of collision involving two horses with their riders and that such collision has been assumingly intentional until the contrary has been established, the riders shall be liable to compensate the victim. According to Mālik, if the horse bolts and collides with a pedestrian, his guardian shall be liable for compensation to any such pedestrian. He stated that when the cavalryman's horse bolts, it is the horse's fault, but when the horse is frightened or afraid, this is due to its cavalryman's behaviour and he is the guarantor for its deterioration, except when the horse is frightened because of something beyond the control of the cavalryman during his movement. Furthermore, Mālik does not see any liability with respect to the cavalryman. If someone else does so to the beast and the latter bolts, then such a person shall be liable for damage[31].

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[31] Sahnūn, *op.cit.*, vol. 11, p. 134.

Therefore, the cavalryman is not immune from liability except when he establishes that the running off was due to a foreign cause beyond his control, or was due to the act of a third party, in which case it is the latter who shall be liable to compensate the injured party.

Shāfiʿi scholars hold that the guardian of a beast shall be liable for any damage caused by his action, asserting that whether or not the damage has been caused by the beast overcoming the rider, through the guardian's fault, intentional, or whether or not the beast was moving backward and collided with each other, or one was going backward and the other was moving forward. Such liability cannot be disregarded by establishing that it was an event of force majeure. Once the guardian of the beast proves the fault of the injured party he shall be liable to compensate him for half of the damage[32].

As regard the compensation for damage resulting from the action of the beast, the Ḥanbali and Ḥanafi scholars[33] maintain that the master shall be liable to compensate the injured party for any damage he has sustained, either to the ship, people or goods. Hence, in the event of collision between two horses and such collision leads to the death of one cavalryman, the

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[32] Al-Nawawī, *Minhāj al-Tālibīn*, vol. 17, p. 355.
[33] Ibn Qudāma, *op.cit.*, vol. 12, pp. 545-6, 549.

other cavalryman's *ʿāqila*[34] (group responsibility) shall be liable to pay blood money to the heirs. However, if both cavalrymen and their horses die, the heirs of each cavalryman shall be liable for compensation in the value of horse and for blood money for the death of the cavalryman. This means that the loss and damage are divided proportionally; with each party liable for the portion of loss caused to the other party and shall not pay half of the entire loss[35]. It should be noted that this rule is important in this study, as we shall see below; and it is currently applicable at the international level.

However, the Māliki and Shāfiʿi scholars hold that each cavalryman incurs half of the damage that the other sustains. Therefore, if both cavalrymen and their horses die, their *ʿaqila* shall compensate the heirs and heiresses of each cavalryman for the half value of each horse, as well as blood money to the beneficiaries. This is because both cavalrymen are to blame for such death. In other words, as the collision has been caused by each cavalryman's action, then half of the blood money is deducted as the death has been caused by both victims. Moreover, the liability shall be divided among the victims and half of the compensation is deducted as both victims have been the cause of such collision[36].

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[34] *ʿĀqila* are heirs who are entitled to inheritance apart from father, grandfather, son, grandson, see al-Nawawi, *al-Majmūʿ Sharḥ al-Muhadhdhab*, vol. 19, p. 153.
[35] Ibn Qudāma, *op.cit*, vol. 12, p. 546.
[36] Al-Zuhayli, *op.cit.*, vol. 6, pp. 378-9.

The Shāfiʿi jurists hold that as the master is the guardian, then he shall be liable for any damages resulting from collision. If both victims are to blame and if it is not the fault of both parties, both masters shall be liable for half of the damage of the other ship[37].

The following section is divided into various sub-sections aimed to explicate the well-known doctrine of the division of loss. In order to comprehend such doctrine, this study looks at the following issues:

The liability for the act of the vessel under the Shāfiʿi school.

The collision under the Rules of Oleron.

The rule of Division of Loss in England prior to 1911.

The Apportionment of Blame under the Maritime Conventions Act 1911.

The Division of Loss under the Ordonnance de la Marine of Louis XIV of France 1681.

4.3.1 THE LIABILITY FOR THE ACT OF THE VESSEL UNDER THE SHĀFIʿI SCHOOL:

The Shāfiʿi jurists have two different views concerning the liability in the event of force majeure. One view considers that the master shall be responsible for any collision caused by strong winds or surging seas or any other natural causes. Hence, the master shall be responsible for the act of

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[37] Al-Nawawi, *Minhāj al-Ṭālibīn*, vol. 17, p. 351.

his ship, and his liability is not protected by establishing that the accident has been caused by a force majeure. The second view considers that the master shall not be liable if the collision has been caused by a force majeure.

4.3.1.1 FIRST VIEW:

According to this view, the master shall be liable for damage and shall, therefore, pay compensation to the other party, and shall not be exempt from such liability even if he were to prove that he has not been capable of averting the accident. Therefore, the master shall be liable for any damages resulting from the collision. The exponents of such view hold that the guarantee is placed upon both masters because the ships were under their control. This means that whatever result is ensued from the collision must be guaranteed even if they were not negligent as in the case of the cavalrymen when they collide and their horses overcame them[38].

They also believe that when the master exploits the ship, he puts it under dangerous position, therefore, he must bear the consequence of such position. They justify their position by stating that the commencement of the act makes the doer liable for the consequences even if there were the interference of another factor. They assert that the initiator of an action shall guarantee it if it subsequently becomes an offence, and if it were caused through different means by, for instance, putting an arrow

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[38] *Ibid.*, at p. 356; Ibn Qudāma, *op.cit.*, vol. 12, p. 549.

somewhere and it is carried away by the wind and kills a man[39]. This is to say that the master is under an absolute liability.

In fact, the foregoing view is far from the unanimous view of the Muslim jurists. The liability for loss of, or damage to, property is governed by the concept of "*amāna*" or trust, as it is indicated above. According to the doctrine of *amāna*, an "*amīn*" or trustworthy shall not be liable for what is lost or destroyed except if there has been negligence or transgression on his part[40]. Apparently, the notion of absolute liability is relatively unfamiliar to Islamic law[41].

4.3.1.2 THE SECOND VIEW:

This view is perhaps is similar to that held by Muslims scholars, in that the master shall not be liable for collision in the event of force majeure, because fault or negligence of the master cannot be established as the cause of collision. Hence, scholars compare this case to the case of thunderbolt that strikes the vessel and, therefore, destroys it. Those who are in favour of this view reject the comparison of the masters of the vessel to the cavalrymen, believing that the latter may control his horse with a bridle, whereas the former is not capable to sail without saying that the wind can overcome

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[39] *Ibid.*
[40] Al-Zuḥayli, *op.cit.*, vol. 4, p. 767-8.
[41] For more details about this statement see, Noble, D.R., *The Principles of Islamic Maritime Law*, unpublished Ph.D. thesis, School of Oriental and African Studies (1988), pp. 149-161.

him[42], but rather the climatic factors and surging sea have their impact on controlling the ship and avoiding the risks.

Certain exponents of the first view believe that such view should be solely applicable to circumstances when the two vessels are on sail. Others, nevertheless, hold that such view should be applicable in the event when both ships are anchored[43].

As regards compensation in the event of collision caused by a force majeure, it is observed that if the first view is adopted, both masters shall be liable as in the event where both masters are worthy of blame. This is to say that they shall both pay half of the damages to the other ships. But, if the second view is adopted, the damages shall be allocated as follows: when both ships and their consignments are owned by their masters [which is rarely nowadays], they shall not be liable for damages. If the ships were chartered and the goods were deposited to them, as in the case of consignment or deposit and property of commenda partnership "*māl muḍāraba*," they shall not be liable, because, as it is explained above, the fiduciary (*amīn*) does not guarantee anything in the absence of negligence or transgression[44].

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[42] Ibn Qudāma, *op.cit.*, vol. 12, p. 549.
[43] Al-Nawawi, *Minhāj al-Ṭālibīn*, vol. 17, pp. 356, 358.
[44] Al-Nawawi, *Minhāj al-Ṭālibīn*, *ibid.*; Ibn Qudāma, *op.cit.*, vol. 12, p. 549-50

When the ship is chartered and the goods on board arrive according to the freight agreed upon, the ships shall not be guaranteed because, they are considered as deposit or trust. However, goods are deemed to be in the hands of "*ajīr mushtarak*" (common carrier), if the owner of such consignment has been there, and the master shall not be liable, but if he has not been there, then there are two different views[45]; one considers that the master shall be liable, and the other considers that the master shall not be liable.[46]

Generally, our concern here is the known doctrine of the division of loss, which shall be discussed below in details. This doctrine may have some roots in Islamic law. The subject matter of the foregoing doctrine is that when both vessels are to blame, the damages shall be allocated amongst the parties involved. In other words, each party shall be liable for half of the damages. This rule has been recognized by Muslim jurists for more than ten centuries and the Roman law did not discover such rule, as it will be revealed below.

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[45] Al-Nawawi, *Minhāj al-Ṭālibīn*, *ibid*, Ibn Qudāma, *ibid*.
[46] For further details see, al-Zuhayli, *op.cit.*, vol. 4, pp. 767-70.

4.3.2 COLLISION UNDER THE RULES OF OLERON:

It is believed that it is not an "organic principle of our law," but derived from an ancient constitution. Its origin is obscure[47]. However, despite these claims the Rules of Oleron are the origins of the rule of loss division[48]. Article XIV of the Rules of Oleron includes, to a certain extent, a parallel rule to the view of the Shāfiʿi scholars. According to this Article, both masters incur damages when the collision has not been caused by a fault. This is to say that both of them shall be liable for half of the entire damage that both ships have sustained. Hence:

> If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandise in each of the said ships damnified, then the whole damage shall be in common, and be equally divided and appraised half by half and the master and mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did not do it willingly or wilfully.

The editor of the foregoing Rules gave unconvincing reasons for such rule, as he states at later stage of the aforementioned provision:

> The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.

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[47] Scott, L.F., "Collision at Sea Where both Ships are in Fault," (1897) 13 *Law Quarterly Review*, 17 at 19.

[48] Azuni, D., *The Maritime Law of Europe*, 379; Marsden, R., *The Law of Collision at Sea*, (11th edn., 1961), 95 (hereinafter cited as Marsden); Owen, D.R., "the Origins and Development of Marine Collision," (1977), 51(4) *Tulane Law Review*, 759 at 763 (hereinafter cited as Owen).

According to the aforementioned Article, when both masters are to blame they are asked to pay for damages equally and regardless of who has been mostly responsible for the collision. We shall see below that the English Common law adopted such rule. Nevertheless, such rule was criticised, as it will be explained in the next pages. In fact, such rule is the application of the liability of the act of object (*fi ʾl al-shayʾ*).

It is noteworthy that the Rules of Oleron adopted a corresponding principle to that recognised under the Islamic law in particular shāfiʿi opinion; that is, the principle of each party's liability for half of the damage of that sustained by the other party, including the damage caused to the vessel, goods and people (the rule of division of loss).

4.3.3 THE RULE OF DIVISION OF LOSS IN ENGLAND PRIOR TO 1911:

In the coming paragraphs we shall discuss how the English court adopted the loss as a result of the act of vessel.

4.3.3.1 BACKGROUND ABOUT THE ADMIRALTY COURT AND COLLISION:

Although the Admiralty Court dates back from the fourteenth century, its continuous series commenced in 1798[49]. There were comparatively few cases for some 250 years, though some significant concepts were raised and introduced as substantive rules[50]. On the other hand, there were no records earlier than the seventeenth century of the loss by collision having been divided by a sentence of the English Admiralty[51]. Prior to 1614, all divisions resulted either in full damages or none[52], and subsequent damages were divided where there was no fault, inscrutable fault, and even sole fault of the defendant's vessel[53].

It is noteworthy that the modern collision law emerged around 1840, owing to a number of coincident events: (a) the Industrial Revolution, free trade, and advances in marine technology…; (b) Victoria ascended to the throne in 1837, and Britannia ruled the waves; (c) Trinity House[54] promulgated the first Collision Regulations in 1840; (d) Parliament in 1840 (and again in 1861) to a great extent extended the jurisdiction over collisions in local tidal

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[49] Healy, N.J. and Sweeney, J.C., "Basic Principles of the Law of Collision," (1991) 22:3 *Journal of Maritime Law and Commerce*, 359 at 361 (hereinafter cited as Healy & Sweeney); Sprague, G.C., "Divided Damages," (1928) 6 *New York University Law Review*, 15, 15-17. in general see, Franck, L., "A New Law for the Sea," (1926) 42 *Law Quarterly Review*, 25-36.

[50] Owen at p. 767.

[51] Marsden at pp. 110-111.

[52] *Ibid.*, at pp. 126-33.

[53] *Ibid*, at pp. 111, 126, 132; Owen at p. 780.

[54] The Trinity House was a society incorporated by Henry VIII in 1514 for the promotion of commerce and navigation and was later made responsible for pilotage and light houses, see Sturt, R.H.B., *The Collision Regulations*, (LLP: London) (3rd edn., 1991), 2.

waters; and (e) the noted judge Dr. Stephen Lushington presided over the High Court of Admiralty from 1838 to 1867[55]. For these reasons, inter alia and collisions were becoming a matter of public concern and a subject of statistics and of comment in print[56].

4.3.3.2 THE CASE LAW:

In the late eighteenth and early nineteenth century, two well-known and leading cases for the period were decided. In 1789, *the Petersfield & The Judith Randolph*[57] contributed to the enactment of the rule that where there was a mutual fault, and even if it were not equal, the damages were to be divided equally. This rule of equal division remained in force until the Maritime Conventions Act 1911[58] and in the United States until 1975[59].

In 1815, Sir William Scott (later Lord Stowell), issued a decision concerning the well-known case *The Woodrup - Sims*[60]. He put forward that there were three divisions of loss for the causes of collision: (1) inevitable accident and sole fault of damaged ship, with no recovery; (2) mutual fault which would result in equal division; and (3) sole fault of other ship, with full recovery.

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[55] For details about this point see, Owen at pp. 768-9.
[56] *Ibid.*
[57] 167 Eng. Rep. 596, Burrell 332 (Adm 1789).
[58] Hereinafter called the Act.
[59] For great discussion about the situation in the united States see, Gilmore, G. and Black, C.L., *The Law of Admiralty*, (2nd edn, 1975), 528 *et seq* (hereinafter cited as Gilmore & Black), also Owen at pp. 759-809.
[60] 165 Eng. Rep. 1422, 2 Dodds 83 (Adm 1815).

The Scottish Court ruled an apportionment of share in the event of mutual fault in *Hay v. Le Neve*[61]. Such ruling was ascertained in 1884 in *Cazyer v. Carron Co*. Lord Blackburn reiterated the point, stating:

> "Until the case of Hay v. Le Neve ... there was a question in the Admiralty Court whether you were not to apportion it [the loss] according to the degree in which they [the two vessels] were to blame; but now it is, I think, quite settled ... that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls"[62].

This rule was justified as inducing care and vigilance on both sides in the navigation[63].

4.3.3.3 CRITICISM OF THE RULE OF LOSS DIVISION:

By and large, this rule came under a lot of criticism as its provisions adversely affected the disputing parties.[64] Furthermore, it was not widely accepted[65], and it raised doubts as to its impartiality[66]. Lord Denman C.J.

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[61] II Shaw's Rep. 395 (HL 1824).
[62] (1884) 9 App Cas 873, 881.
[63] Mankabady, s., *Collision at Sea*, (North-Holland Publishing Company: Amsterdam) (1978), 25, (hereinafter cited as Mankabady).
[64] Gaskell, N.J.J., Debattista, C. and Swatter, R.J., *Chorley & Gill's Shipping Law*, (Pitmans Publishing: London) (8th edn, 1987), 382, (hereinafter cited as Chorley & Gill's Shipping Law)
[65] Goschka, D.A., "Goodbye to All That! – The Unlamented Demise of the divided Damage rule," (1976) 8 *Journal of Maritime Law and Commerce*, 51, 61-65.
[66] Gilmore & Black at p. 538.

said: "It is an arbitrary provision of law of nations, neither dictated by natural justice, nor, possibly, quite consistent with it"[67].

The need for a rule that produces more justice came to the surface. Consequently, in 1910, the Brussels Collision Convention of 1910 [hereinafter referred to as "Collision Convention of 1910"] emerged. It was incorporated in the British law by s.1 of Maritime Conventions Act 1911 [hereinafter referred to as the Act of 1911].

4.3.4 THE APPORTIONMENT OF BLAME UNDER THE MARITIME CONVENTIONS ACT 1911[68]:

The Act of 1911[69] brought the Collision Convention of 1910 into effect in England, which abolished the old rule of division of loss.

Article 4 of the convention made each ship, in cases of two or more vessels at fault, liable for damages to be calculated in proportion to the degree of fault. Article 6 of the Convention eliminated the absolute presumption of fault regarding collision liability and the infringement of any collision regulations. Article 4 further presented for equal apportionment where it appears impossible to apportion the degree of fault.

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[67] *De Vaux v. Salvador* (1835) 4 Ad. & El. 420.
[68] For great details about the framework and principles of the Collision Convention of 1910 and the British Maritime Conventions Act of 1911 see, Brandon, H.V., "Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911," (1977) 51 *Tulane Law Review*, 1025-46; Franck, L., "Collisions at Sea in Relation to International Maritime Law," (1896) 12 *Law Quarterly Review*, 260, 263 *et seq.*
[69] MCA 1911, 1&2 Geo 5, c.57, p. 1.

The Act of 1911 includes the aforesaid provisions under Article 1. Where two or more vessels are at fault the Act provides under section 1(1)(a)(b) that:

> 1. (1) Where, by the fault of two or more vessels damage or loss is caused to one or more of these vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:
> Provided that –
> (a) If having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
> (b) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed, …

The preceding provisions were, as described by a commentator[70], "a result which conforms in a higher degree with the demands of justice." Yet, the preceding article brings forward difficulties in apportioning the degree of fault, as many courts find it difficult to assess the causative potency in terms of percentage[71]. In an attempt to solve this problem, Lord Denning, M.R. in *The Koningin Juliana*[72] formulated the following rule: "The degree of fault is not to be measured by counting up the number of faults on each side. It is to be measured by assessing both their blameworthiness and their causative effect."

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[70] Chorley & Gill's Shipping Law at p. 383.
[71] See, Lord Wright in *The MacGregor* (1943) A.C. 197; (1942) 74 Ll.L.Rep. 82 at pp. 199 and 85 respectively.
[72] [1974] 2 Lloyd's Rep. 353 at 356.

On the other hand, Owen said that the concept of proportionate fault is somewhat modern, having been initiated only just more than 100 years ago[73]. However, this statement contradicted the inference of the aforementioned paragraphs, which purportedly claim that the Islamic law is the first regime in the universe to recognise the rule of apportionment of loss according to the degree of fault[74]. Our concern is not to discuss the Act of 1911 or the Collision Convention of 1910, but rather to discuss the root of such rule and its development. Unfortunately, Owen himself committed the same mistake when he claimed that France was the first country to adopt a proportionate fault rule[75], though many French commentators believed it is a borrowed principle which is alien to the French law, as shall be clarified below.

As for the English common law, until the Act of 1911, the proportionate fault rule in England was mentioned twice by the House of Lords as a mere possible rule in *Hay v. Le Neve*[76] and *The Woodrop-Sims*[77]. It was also referred to once by the Privy Council in *General Steam Navigation Co. v. Tonkin*[78]; and once by a commentator[79]. As regards its origin, there is a consensus among Common law legists[80] that the rule of apportionment of loss, which is thought to be a principle that had evolved from the rule of

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[73] Owen at p. 792.
[74] See pp. 164-5.
[75] Owen, *op.cit.*, at p. 793.
[76] II Shaw's Rep. 395 (HL 1824).
[77] 165 Eng. Rep. 1422, 2 Dodds 83 (Adm 1815)
[78] 13 Eng. Rep. 314, 322.
[79] For details see, Owen at p. 793.
[80] Gilmore & Black at pp. 3-11; Healy & Sweeney at pp. 359-361; Owen at pp. 779-80 and 791-93, and; Marsden at pp. 109-10.

division of loss, first appeared in the Rolls of Oleron. It seems that there were not enough studies in the area of the origin of the preceding rule. Perhaps the French scholars have contributed slightly to this area by providing some information about the rule of division of loss and the rule of apportioning the loss, as we shall see below.

4.3.5 THE DIVISION OF LOSS UNDER THE ORDONNANCE DE LA MARINE OF LOUIS XIV OF FRANCE 1681:

The French Marine Ordonnance adopted the idea of the liability for the act of object for the first time in the event of collision at sea. Article 10 states that when two vessels collide and result in the loss of the vessels, both vessels shall be liable for such loss, whether the collision took place at transit route, at the port or even off-shore. Article 11 further provides that if, however, the collision occurs due to negligence on part of both masters, the loss should be borne by the party at fault.

Article 11 is the application of the general rules. Article 10, nevertheless, brings forward an alien provision to the concept of French law, as it makes it incumbent upon the wrongdoer to be liable for loss caused by collision, when the fault of the collision is unworkable. However, the fault (*culpa*) was the basic of civil liability, and the idea of liability for the act of object was unknown.

In discussing the liability for the act of object, Mazeaud stated that it is the application of the general rules rather than exceptional rules, adding that the old law recognised the litigations of primitive concept of liability … a child would hit the object he collides with as if it caused damage to him. As a result, he would punish that object. Hence, there is criminal liability and civil liability and revenge simultaneously … nonetheless there is not a general principle for civil liability for the act of object binding upon the guardian of the object to repair the damage …, therefore the old law recognised the general principle of criminal accountability of the object, yet reduces it at the same time to the idea of revenge. On the other hand, it cannot be said that the old law recognised the general principle of civil liability of the act of object[81].

Dispute was risen among the interpreters of the Marine Ordonnance, namely, Valin and Emérigon about the purport of the aforementioned Article 10. Valin sees that there are two types of collision: (a) collision due to fault, and (b) collision not due to fault. The wrongdoer in the event of the former type shall be liable for loss and damage caused by his act. If the fault is impracticable, both vessels shall be liable for the damage[82]. Emérigon added another type of collision, that which is caused by force majeure or inevitable event. He suggested that the Marine Ordonnance overlooked the force majeure case, which should be subject to the general rules. He also

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[81] Mazeaud et tune, *Traité de la responsabilité*, (e éd., t.3, vol. 2, no. 1012 et 1013).
[82] Valin, *Nouveau Commentaire Sur l'Ordonnance de la Marine*, T.2, p. 178.

believed that Article 10 should be read as follows: "In the event of inscrutable collision, each vessel shall be liable for the entire loss resulting from the collision[83]. Emérigon presumed that in the event of collision, both the merchants and their insurers shall be liable for damages, but not the masters, since in the event of suspicion it is presumed that the loss was due to dangerous sea conditions and not due to error[84].

The Napoleonic Code de Commerce of 1807, primarily a re-enactment of the Ordonnance, distinguished between three types of collision[85], as described above. The Code did not provide specifically for *Faute commune* (mutual fault)[86], but it was construed as if it contained the language of the 1681 Ordonnance prescribing equal division[87].

4.3.6 CONCLUSION:

It seems that the provisions of Article 15 of the Rules of Oleron, Articles 4 and 6 of the Brussels Collision Convention of 1910, Article 1 of the Maritime Conventions Act of 1911, and Articles 10 and 11 of the Marine Ordonnance of 1681 are similar to the provisions recognised by Islamic law with respect to collision, particularly, the liability for the act of object and more specifically the fundamental rules of division of loss and apportioning

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[83] Emérigon, *Traité des Assurances et des Contrats à la Grosse*, T. 1, p. 412 et suiv.
[84] *Ibid*, at p. 418.
[85] Article 407.
[86] Owen, at p. 793.
[87] Hillyer, H., "Comparative Negligence in Louisiana," (1936) 11 *Tulane Law Review*, 112 at 119 n. 53.

the loss according to the degree of fault. As for the doctrine of division of loss was adopted by the Māliki and Shāfiʿi scholars who say that half of the entire damages, whether caused to the ship or goods or even people on board, shall be divided between them equally because the damages have been caused by both of them[88]. Whilst the doctrine of apportioning the loss was adopted by Ḥanbali and Ḥanafi scholars who say that each master should be liable for the damage he has caused. This is to say that each master shall be liable to repair the entire damage caused to the other ship, including goods and people, as such damage has been caused by his action[89]. The liability shall be in proportion to his fault. Therefore, the argument that France was the first country to adopt a proportionate fault rule[90] should be reconsidered, particularly when it is proved that the *Sharīʿa* has recognised such rule for more than ten centuries.

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[88] Ibn Qudāma, *op.cit.*, vol. 12, p. 546; also, al-Shāfiʿi, *Al-Umm*, vol. 6, p. 86.
[89] Ibn Qudāma, *op.cit.*, vol. 12, p. 545.
[90] Owen, *op.cit.*, at p. 793.

5. SALVAGE (*AL-INQĀDH AL-BAḤRI*):

5.1 PREAMBLE:

Salvage and rescue are services carried out by third party in order to preserve the vessel in danger and of probable sink or the rescue of wreck from loss[1]. However, the meaning of salvage is different from rescue; this may cause argument over the service that was provided. Salvage is the service that is provided to a vessel in danger, whilst rescue is assisting or saving the wreck of any part of vessel or its cargo, in order to preserve the vessel. Because some legislation ordered high rewards for those who provided rescue in comparison with those who provided salvage, dispute was raised over the criteria that

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[1] The meaning of wreck is well explained by the English law. At Common law, "wreck" is confined to those portions of the ship and cargo which have been cast by the sea on to the land, see *Sir Henry Constable's case* (1601) 5 Coke 106. On the other hand, for the purpose of part IX (ss. 510-571) of the Merchant Shipping Act 1894 wreck is defined as follows: "The expression 'wreck' includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water." Flotsam, jetsam and lagan were defined in *Sir Henry Constable's case* as follows: "*Flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea; jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perish. Lagan ... is when the goods are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again, ... and none of these goods which are called jetsam, flotsam, or lagan, are called wreck so long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be said wreck.*" Derelict has been defined *in Cossman v. West*, (1886) 13 App. Cas. 160, at 180-1, as a ship or cargo which has been abandoned or deserted at sea by those in charge, without any hope of recovering it or returning to it. It appears that the definition under the Act is wider than the one recognised under the Common law. For more details about the meaning of the wreck see a recent case *Pierce v. Bemis (The Lusitania)* [1986] Q.B. 384; for further discussion about the preceding case see Lillington, S.D., "Wreck or Wreccum Maris? *The Lusitania*," [1987] *Lloyd's Maitime and Commercial Law Quarterly*, 267. For further details see also, Goddard, K.S., "Is There a Right to Wreck?" [1983] *Lloyd's Maritime and Commercial Law Quarterly*, 625.

should be followed when it considered the vessel was a wreck; therefore claiming reward for the services.

The Brussels Convention of rescue and salvage of 1910 eliminated such distinction and applied the same provisions on those services, namely salvage and rescue. Article one stipulated:

Assistance and salvage of seagoing vessels in danger, of any things on board, of freight and passage money, and also services of the same nature rendered by seagoing vessels to vessels of inland navigation or *vice-versa*, are subject to the following provisions, without any distinction being drawn between these two kinds of service (*viz.* assistance and salvage), and in whatever waters the services have been rendered.

It is suggested that the first body of laws that dealt unequivocally with the various characteristics of the shipwreck question was the famous collection of the RSL[2]. It is stated that the old legislation did not contain any rules concerning salvage. Valin said[3] that evil was inherent to the degree that it was not wise that legislator should intervene to withhold such inherent disease.

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[2] , Melikan, R., "Shippers, Salvors, and Sovereigns: Competing Interests in the Medieval Law of Shipwreck, (1990) 11 *Journal of legal History*, 163 at 165.
[3] Valin, *Commentaire sur l'Ordonnance de la Marine*, T. 2, p. 587.

For long time, the legislator attempted to preserve wreck that were in danger from pirates, as the latter dedicated their efforts to sink the vessels and plunder their money and cargo. That is to say the legislator's role was confined to deter what was known, the right of wreck or the right of sink.

Islamic literatures are the oldest documents that prescribe an obligation of salvage and rescue. The medieval maritime legal collections included laws that are similar to those recognized under the Islamic law, and this may suggest that these collections of medieval rules were extracted from Islamic jurisprudence.

The laws of salvage included in the medieval legal collections raised questions among historians. It is known that the right of wreck and the right of sink were exercised in Europe until the end of the sixteenth century, and because the historians presumed that the medieval legal collections had embraced the European maritime law, it was of some difficulty to illustrate the presence of the commitment to salvage and rescue in the medieval legal collections. That is why Pardessus presumed that these provisions were inserted in the medieval legal collections at a later time[4].

In the following paragraphs we shall give a historical account of the old legislations in this area and Islamic law principles, as well as the medieval legal collections regarding salvage.

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[4] Pardessus, *op.cit.*, T.1, p. 313.

5.2 HISTORICAL PERSPECTIVE:

5.2.1 GREEK AND SUNKEN OBJECTS:

The oldest legislations that dealt with the right of wreck or the right of sink were some provisions traced back to the Greek era. From these provisions, Seldom and Pastoret assumed that, during the Greek era, the state treasury seized the sunken objects[5]. Pardessus contradicted such argument and suggested[6] that the purport of such laws were the innovation of some writers; he further refused to accept the idea that the meaning of those rules applied to what was said about them (laws). Pardessus also could not find in those legislations any law that prevented the owner to claim his object; he assumed that those laws were concerned with the sunken object that had no owner; hence, it is obvious that the state treasury had priority over these objects, rather than those who had found them in the nearby shore[7].

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[5] Pastoret, *Hostoire de la Legislation*, T. 7, p.245.
[6] Padessus, *op.cit.*, T.1, p. 48.
[7] *Ibid.*

5.2.2 THE INDIGNITY OF COMMERCE UNDER THE ROMAN:

It appeared that the right of wreck and the right of sink were implemented throughout the Roman era; by drawing a comparison between the Romans, the Phoenicians and the Greeks, writers can observe that the Romans were less brave than the other nations, as they considered the sea as a frightening enemy; thus, they were not skilful mariners[8].

The Romans despised commerce and in particular the marine commerce; accordingly, the Roman law did not encourage commerce. Only slaves were permitted to exercise trade, and agriculture was an honorable craft[9].

Ciceron considered commerce as a school of cunning and deception, and the only aim of those who practiced it was to exploit the civilians. This judgment led the Roman not to pay any attention or safeguard the property that were found in the nearby shore, because the commerce was in the hands of foreigners, who were considered an enemy; those coastal inhabitants used to consider anything coming from the sea to shore as pleasant hunt; thus they used many tricks and ways to sink the ships[10].

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[8]Nicole, *Etude de la Législation Française des Naufrages et Épaves*, these Paris, 1909, p. 11.
[9]Pardessus, *op.cit.*, T.1, p. 53.
[10] Nicole, *op.cit.*, p. 12.

5.2.3 THE ROMAN LEGISLATIONS:

The Roman law stipulated that the sunken objects belonged to the first person who found them; the idea was that the stranded vessel found in the middle of the sea or at shore belonged to the first person who put his hand to them. These objects were considered as abandoned things and their possession fell under the custody of the one who found them[11]. Rougé claimed that under the Roman law when the crew abandoned the ship in the middle of the sea; it was regarded as the abandonment of the entire rights of ownership from the side of the legitimate owners. These laws were implemented until the end of the Empire's era, because it was mentioned in Hermogénés in the second century[12].

With regard to the wreck that is thrown at shore, either due to sinking or due to jettison because of heavy storm, some provisions of the Digest consider those objects as the possession of their legitimate owner. A decree from a Roman Council orders the coastal inhabitants to assist those facing sinking and to apply the punishment of the law of Cornelia to those who obstruct salvage[13]. On the contrary, Valin stated that those laws were ignored at a later stage; the

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[11] Halgand, Sauvetage, *Assistance et Obligation de Secours en Droit Maritime*, these Rennes, 1901, p. 6.
[12] Rougé, J., *Organisatien du Commerce Maritime en Méditerrannée sous l'Empire Romain*, 1966, p. 37 *et seq.*
[13]Halgand, *op.cit.*, p. 7.

succeeding emperors preferred the right of treasury to the superiority and right of justice[14].

On the other hand, Rougé stated that some parts of the Digest's provisions stipulated that the right of sink was applied until the end of the empire's era. The most significant text is that of Callistrate by order of Hadrien, which prohibited the coastal inhabitants to exercise the right of sinking. Therefore, it appears from this provision that the right of sinking was applied until that time[15]. Furthermore, Rougé mentioned that there were many provisions which gave the State Government the right to the wreck[16].

5.2.4 SALVAGE AFTER THE ROMAN EMPIRE'S DECLINE:

After the weakness of the Roman Empire and its separation into two parts, the right of sinking was applied in eastern and western parts of the Empire. According to Valin, the only decision was the one issued by Andronic Comnéne, the emperor of eastern part, issued in 1183. Andronic received many complaints about the ignorance of the judges to combat the spoliation of property and people who were facing sinking; thus he decided to shoulder such problem. He was informed about such old disease (spoliation of sunken property and people) which had no cure. But Andronic ignored such tales and

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[14] Valin, *op.cit.*, vol. 2, p. 580.
[15] Rougé, *op.cit.*, p. 330 *et seq.*
[16] *Ibid.*

issued a decision containing heavy punishment, not only against those who exercised spoliation but also against those who were capable of preventing it but did not do so[17]. However, such decision did not last for long and was ignored later because Andronic had passed away, and the Members of the Counsel gained benefit from the so-called debris[18].

In the western part, the right to seize the sunken property remained as it was before, either as an entitlement to the inhabitants or to the rulers or to the state treasury[19]. On the one hand, this right was applied to anything that showed in the nearby shore and was considered as a type of reward for the coastal inhabitants, a right to revenge and as a result of prevailing hostility[20]. On the other hand, the weakness of the central government and the emergence of the feudal system gave the princes absolute right over their territory; thus they had exclusive right to the debris, and this was suitable for the kings[21].

5.2.5 THE INTERFERENCE OF THE CHURCH:

By the end of the eleventh century and the beginning of the twelfth century, the tradition of pillaging the sunken ship was firmly established in the minds of people; hence the church was forced to intervene in an attempt to prevent this

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[17] Valin, *op.cit.*, vol. 2, pp. 581-2.
[18] *Ibid.*
[19] Pardessus, *op.cit.*, vol. 1, p. 315.
[20] *Ibid.*
[21] *Ibid.*

kind of behaviour. As a result, in a meeting held in Nantes in 1127 and in Latran in 1179, the council imposed a punishment on the robbers of the wreck by prohibiting them from indulgence[22].

The right of sunk was not only applies to the abandoned ships or those lost in the nearby shore, but also to those ships that were forced to head to ports as a result of bad weather[23].

5.2.6 ENGLISH LAW:

The main body of English Common law relating to civil salvage was decided during the nineteenth century[24]; to a large extent, they are indebted to the judgments of Dr. Lushington[25], and subsequently developed during the twentieth century[26]. However, salvage was brought to the English law from the international maritime codes that existed in all the maritime cities of Europe in the middle ages[27]. The earliest material dealing with goods that washed up on

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[22] Halgand, *op.cit.*, p. 19.
[23] Mas Latrie, *Traités de Paix et de Commerce et Documents Divers Concernant les Relatiens des Chrétiens avec les Arabes d'Afrique Septentrionale au Moyen – Age*, T. 1, p. 97 note 1.
[24] *Salisbury's law of England*, vol. 43(1), para. 924.
[25] Waddams, S.M., "Dr Lushington's Contribution to the Law of Salvage (1838-67)," [1989] *Lloyd's Maritime and Commercial Law Quarterly*, 59.
[26] For a review of the law of salvage see *The Goring* [1988] I Lloyd's Rep. 397 at 399 *et seq*, HL *per* Lord Brandon of Oakbrook.
[27] *Chorley & Gill's Shipping Law*, p. 427.

shore or wreck suggested that these goods belonged to the king irrespective of the fate of the shipper[28].

As far as the duty of assistance is concerned, it has been established in England by the imposition of the statutory duty to go and assist ships in distress[29]. However, it can be said that section 458 of the 1854 Merchant Shipping Act was the first to place the duty of assistance. Furthermore, such duty can be read clearly from the pronunciation of s. 565 of 1894 Merchant Shipping Act, which re-enacted s. 476 of the Merchant Shipping Act, 1854, s. 546 of the 1894 Act states:

> When any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage to be determined in case of dispute in the manner hereinafter mentioned.

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[28] Melikan, R., *op.cit.*, at p. 172; Marsden, R.G., "Admiralty Droits and Salvage – Gas Float Whitton, No. II, (1899) 15 *Law Quarterly Review*, 353-366.
[29] For details about these provisions see *Chorley & Gill's Shipping Law*, pp. 374-5.

5.2.7 FRENCH LAW:

As for the French law, an order was issued in 1543 concerning the first general rules about the wreck. Article 11 deals with the wreck that is found at shore and Article 12 deals with the wreck found at sea or that is brought from sea. According to the preceding order, the merchant is entitled to claim his wreck within a year and one day of the day from which such wreck was found, and the merchant is required to pay one third of the value of his wreck to salvor. If the merchant has not appeared within this period, the wreck is divided into three parts; one for the salvor, one for the ruler of the province and one for the admiral. Subsequently, this period was reduced to two months[30].

In 1629, Lewis XIII issued an order called Code Michoud, stated in Article 447:

"Due to what were observed that many breechings were committed at the enforcement of the orders that were concerned with the right of wreck, we order from now onward that every master of ship when he comes across goods or any floating or sunken object at sea or at shore to notify the maritime judge"[31].

"If such objects remained for three months without any claim, such things will be sold and the price will be delivered with its sample (goods) to a merchant to

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[30] Pardessus, *op.cit.* vol. 1, p. 318 margin no. 2.
[31] Nicole, *op.cit.*, p.45.

keep it for a year. The salvor right should be determined in accordance with justice by sea authorities and the presence of merchants and their representatives"[32].

The Ordonnance de la Marine of 1681 specified the fourth book under the ninth title. Article 1 stated:

"We are committed to put under safeguard the ships, its crew and cargo that may be thrown by storms to our shores, or that are sunk by any means, and that were survived from sunk."

Article 24 added: "it is claimable, any stranded ships, cargo and any thing like wreck or sunken object, either found at sea or at shore, within one year and one day of the promulgation that is required. Those objects should be returned to its owners or representatives after paying the salvor all the expenses that he incurred."

Article 26 added that if the property and other objects remained at the authority and the specified period expired without any claim:

"They will be divided among the king or provinces rulers whom we relinquish our rights to them and the admiral. This is after paying a just reward and the expenses to the salvor that he incurred."

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[32] *Ibid.*

Article 27 stipulated that in the event of the sunken objects at sea or brought from sea, the salvor is entitled to one third of wreck and the remaining two thirds should be given to its owner within one year and one day, otherwise will be divided between the king and the admiral.

It is worth mentioning that the Code de Commerce of 1809 did not contain provisions relating to salvage.

It is noted that the obligation to assist first emerged in a provision concerned with collision. Article 4 of the law that was issued in 10th March 1891 imposed a duty upon the master who encountered collision to take all necessary measures to assist the other collided vessel, without endangering his vessel, crew or passengers.

5.2.8 BRUSSELS CONVENTION OF 1910:

As far as the international convention is concerned, the Brussels Convention of 1910 organized the situations that were related to salvage, Article 11 states:

"Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.

The owner of a vessel incurs no liability by reason of contravention of the above provision."

Article 12 recommends that each state should incorporate in its legislations deterrent procedures to anyone who breach the preceding Article, that is Article 11.

French law of 1916 adopted the rules of the Brussels Convention and imposed a penalty and detention on any master who refrained from assistance. They also adopted the same provisions of the law of 1967.

5.3 SALVAGE UNDER THE ISLAMIC LAW:

5.3.1 PREFACE:

One of the fundamental approach of the Islamic law is to assist the third party and not to interfere with their property; providing the services of salvage are liability prescribed by the *Sharī'a*. By looking at the Islamic jurisprudence (*fiqh*), it appears that there is a section dealing with wreck under the title "*al-luqaṭa;*" the rules explained by Muslim scholars do not deal with wreck only, but also covers any claimable property (*māl*), wherever it is found. The reason why we have selected the principle of *al-luqaṭa* as the one that is compared with the rules of wreck, because we shall discover below that there are many

analogous rules among them. Basically, both rules deal with picking up strayed articles and the subsequent legal issues that cover such action.

The maritime legal collections of medieval included similar rules that were adopted by Muslim scholars regarding salvage and rescue. The laws and customs in Europe gave the right to individuals and rulers to seize the sunken property; it is contradictory to attribute the maritime legal collections of medieval to European systems.

When Pardessus commented on the Rules of Oleron, he presumed that part four of the so-called rules, which prescribed an obligation to salvage, was written at a later period of the first three parts; he asserted that it was difficult to believe in that, at the time when the laws frankly gave the right to the rulers of provinces to seize the sunken property. Greed and customs became for long time as a right against the insertion of the rules that were adopted by the order of 1543[33].

Pardessus has maintained that there was no presumption that one could rely upon to decide which person wrote these provisions (those provisions related to salvage or part four). As Garcie published for the first time in his book "Routuer de la mer", which he completed in 1484 and printed in 1542, whilst

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[33] Pardessus, *op.cit.*, vol. 1, p. 320.

within the following years the order of 1543 was not issued yet; Pardessus concluded that if Garcie did not mention that he was a merchant, we might have attributed that to him[34].

We shall now discuss the rules of the *Sharī ʿa* and those mentioned under the medieval legal collections which are related with the law of salvage and rescue:

Salvaging property at shore.

Salvaging property at sea.

Salvaging the vessel.

5.3.2 SALVAGING PROPERTY AT SHORE:

Muslim jurists have defined "wreck" as "*luqaṭa*"[35]. "*Luqaṭa*" is described as a stray property (*māl*) from its owner, found by someone else; or an object that is found by someone somewhere and pick it up as trust[36]. Accordingly, *luqaṭa* includes gold or other articles or anything that is found at shore, as a result of jettison.

Muslim scholars have considered safeguarding such objects as a duty on any trustworthy person who finds such objects (namely the wreck). They have

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[34] *Ibid.*

[35] For other pronunciations see, Ibn Qudāma, *al-Mughni*, *op.cit*, vol. 8, p. 290; al-Nawawi, *al-Majmū ʿSharḥ al-muhadhdhab*, vol. 15, p. 250-1; al-Bahūti, *al-Rawḍ al-Murbi ʿ*, vol. 2, p. 264; al-Zuḥayli, *al-Fiqh wa Adillatoh*, *op.cit.*, vol. 5, 879.

[36] Ibn Qudāma, *al-Mughni*, op.cit, vol. 8, p. 290; al-Bahūti, *al-Rawḍ al-Murbi ʿ*, vol. 2, p. 264; al-Zuḥayli, *al-Fiqh wa Adillatoh*, *op.cit.*, vol. 5, 879; *al-Mawsū ʿa al-fiqhiyya*, vol. 35, p. 295.

stated that there are some obligations placed on both parties, the owner of the wreck and the finder of the wreck (*multaqiṭ*).

The following subsection deals with such points:

The obligations of the finder (*multaqiṭ*).

The rights of the finder.

The liability of the finder.

Claiming the wreck or *luqaṭa*.

The rights of the owner of the wreck or *luqaṭa*.

5.3.2.1 THE OBLIGATIONS UPON THE FINDER (MULTAQIṬ):

5.3.2.1.1 THE ORIGINAL SOURCE OF A FIND (LUQAṬA):

Before explaining the duties that are placed upon the finder, we shall indicate a sound *ḥadīth* that deals with of the stray object. Zaid b. Khalid al-Juhani reported: "A man came to Allah's Apostle (may peace and blessing be upon him) and asked him about picking up of stray articles." He said: "Recognise (well) its bag and the strap (by which it is tied) then make announcement of that for a year. If its owner comes (within this time return that to him), otherwise it is yours." He (again) asked: "(What about) the lost goat?" Thereupon he (the Holy Prophet) said: "It is yours or for your brother, or for the wolf." He again

asked: "(What about) the lost camel?" Thereupon, the Prophet, may peace and blessing be upon him, said: "You have nothing to do with it; it has a leather bag along with it, and its shoes also. It comes to the watering-place, eats (the leaves of the) trees until its master finds him."

This *ḥadīth* is essential to the study of wreck, as it adopts the fundamental obligations of the wreck, as we shall discover below. That is why we shall refer to it in several occasions; hence, we shall call this *ḥadīth* hereinafter as "Zaid's *ḥadīth*".

5.3.2.1.2 DUTY TO PICK UP AND SAFEGUARD THE STRAY OBJECT:

Ḥanafi[37] and Shāfiʿi[38] scholars hold the view that it is recommended (*mustaḥabb*) to pick up the stray object, because it is a duty upon each Muslim to protect the property of his Muslim brother, as revealed in the holy *Qur'ān* where it is stated: "*The Believers, men and women, are protectors, one of another*"[39]. Therefore, it is a duty upon every Muslim to protect the property of his/her fellow Muslim; furthermore, such argument is confirmed by the *ḥadīth*, where the Prophet, may peace and blessing of Allah be upon him, said: "Allah

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[37] Al-Kāsāni , *Badāiʿal-Ṣanāiʿfi Tartīb al-Sharāiʿ*, vol. 6, p. 304.

[38] Al-Shāfiʿi, *al-Umm*, vol. 4, p. 65-67; al-Nawawi, *al-Majmūʿ Sharḥ al-muhadhdhab*, vol. 15, p. 249.

[39] *Qur'ān* IX:71.

helps the servant as long as he helps his brother." Whilst Māliki[40] and Ḥanbali[41] scholars have adopted the view that taking stray objects is reprehensible (*makrūh*); this is due to the ruling of Ibn ʿUmar and Ibn ʿAbbās who have stated that the person who picks stray object may be vulnerable to take prohibited property (*akl māl al-ḥarām*), and also he may fail to carry out the obligations placed upon him.

The aforesaid suggestions were the general view of the four schools of *Fiqh* (Islamic jurisprudence); however, they gave detailed account for their arguments. At this stage we shall focus on the opinion of Ḥanafi and Shāfiʿi schools who have stated that it is recommended (*mustaḥabb*) to pick up the stray object for someone who trusts himself if he fears that such stray object may fall into the hand of a corrupt person. However, if he does not fear that it may be lost, it is permissible (*mubāḥ*) for him to pick it up and safeguard it, but if he does not trust himself that he may pick up the object for himself and not to safeguard it for its owner, it is prohibited (*ḥarām*) to pick it up. This is confirmed by the *ḥadith* of the Prophet, peace and blessing be upon him, when he said, "Only the corrupt man is the one who keeps the lost beast"[42].

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[40] Mālik Ibn Anas, *al-Mudawwana al-Kubra* ,vol. 6, p. 173, Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol. 2, 304.
[41] Ibn Qudāma, *al-Mughni*, op.cit, vol. 8, p. 291.
[42] Al-Zuḥayli, *op.cit.*, vol. 5, p. 770.

It seems that whether or not it is an obligation upon a person to pick up the stray object depends entirely on the safety and trust prevailing over the country. However, it seems nowadays that taking these stray objects has become an obligation, because of the lack of safety and trust that exist in most, if not all, countries[43].

Once the finder picks up the stray object then there are certain obligations placed on him, namely: providing witness, making an announcement of the stray object and preserving it.

5.3.2.1.3 PROVIDE TESTIMONY OR WITNESS:

The stray article is considered as a trust in the hand of the finder; he does not guarantee it, unless in the case of transgression or refusing to give it back to the owner when he is requested so. Providing a testifying to the stray article is not an obligation but rather recommended (*mustaḥabb*); this is the opinion of the majority of Muslim scholars, because in Zaid's *ḥadīth* the Prophet, peace and blessing be upon him, simply required the announcement of the stray article, but said nothing about providing a witness. They justified this opinion by stating that in providing a witness, the founder of the stray object is protected from greed and, hence, could not hide the article or keep it for his heirs, if he is

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[43] For more details see al-Nawawi, *al-Majmū'*, *op.cit.*, vol. 15, p. 265-66.

passed away, or keeps it away from creditors (*goramā'*) if he becomes insolvent; the finder is providing a witness either in order to possess it or to preserve it[44].

5.3.2.1.4 MAKING AN ANNOUNCEMENT (TA'RĪF):

5.3.2.1.4.1 THE IMPORT:

This means that the finder of the stray article should announce or advertise it in some particular places, as we shall discuss below, and therefore, people will be informed about it. But the finder should simply give general description, if any one drops money or clothes, and describe its bag (*'ifāṣ*) and the string it is tied with (*wikā'*), as required in Zaid's *ḥadīth*: "Recognise (well) its bag and the strap (by which it is tied) then make announcement of that," and should not give details, because if he does so the listener will know its specified description; thus, such description is not the evidence for ownership[45], in addition, it will not be mixed with his property[46].

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[44] *Al-Mawsū'a al-fiqhiyya*, vol. 35, p. 297.

[45] Al-Kāsāni , *Badāi'*, *op.cit.*, vol. 6, p. 307; al-Zuḥayli, *op.cit.*, vol. 5, p. 775.

[46] Al-Nawawi, *al-Majmū'*, *op.cit.*, vol. 15, p. 255.

5.3.2.1.4.2 THE NATURE OF THE ANNOUNCEMENT:

The finder (*multaqiṭ*) of the stray article is bound[47] to make an announcement or to entrust such task to someone else, because the Prophet, peace and blessing be upon him, in Zaid's *ḥadīth* said: "Recognise (well) its bag and the strap (by which it is tied) then make announcement of that for a year." This is because, as Ibn Qudāma said, "If the finder of the stray article does not make announcement that means the owner will not know where it is when he comes searching for it in the place where he has dropped it." In addition, if the announcement is not considered an obligation, then picking up the article is prohibited, because it is better for the owner of the stray article if it is left in its place; moreover, because the announcement is an obligation on whoever wants to possess it, the same should apply to the one who wants to preserve it[48].

5.3.2.1.4.3 THE FEES FOR THE ANNOUNCEMENT:

The fees for the announcement, as it may be published in the newspaper (as recognised nowadays) and other means, should be paid by the finder; this is the opinion of Ḥanbali[49] and Ḥanafi[50] scholars; whilst Shāfi'i[51] scholars hold the

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[47] Ibn Rushd, *Bidāyat Al-Mujtahid, op.cit.,* vol. 2, 305; Ibn Qudāma, *al-Mughni, op.cit,* vol. 8, p. 292; Al-Shāfi'i, *al-Umm*, vol. 4, p. 66; al-Bahūti, *al-Rawḍ al-Murbi', op.cit.,* vol. 2, p. 265; Mālik Ibn Anas, *op.cit.*,,vol. 6, p. 173; al-Nawawi, *al-Majmū', op.cit.*, vol. 15, p. 256.

[48] Ibn Qudāma, *al-Mughni, op.cit,* vol. 8, p. 292.

[49] *Ibid*, p. 295; al-Bahūti, *al-Rawḍ al-Murbi', op.cit.,* vol. 2, p. 265.

[50] Al-Nawawi, *al-Majmū', op.cit.*, vol. 15, p. 256; al-Zuḥayli, *op.cit.*, vol. 5, p. 778.

[51] Ibn Qudāma, al-Mughni, *op.cit.*, vol. 8, p. 295.

opinion that, since the announcement is obligatory on the finder, the finder is not obliged to pay such fees, as long as he picks it up to protect it for its owner; but if he picks it up so that he could own it later, then he should pay such fees. It seems that such a view is acceptable.

5.3.2.1.4.4 EXPENSES FOR PROTECTING A STRAY ARTICLE

As for the expenses he has paid for the protection of the stray object, if he spends money for protecting the article without permission from a judge, then he has volunteered to do so (*mutabarri* ʿ) and does not have any right over the property of the absentee (*māl al-ghā'ib*), so the owner should not pay any expenses he has not permitted; however, if the finder did so after taking permission from a judge, then any expenses he had paid should be reimbursed[52]. On the other hand, the Māliki scholars hold the view that the finder should be reimbursed for such expenses[53], even though he did so without the permission of the judge[54].

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[52] Al-Shāfiʿi, al-Umm, vol. 4, p.68; Ibn Rushd, *Bidayat al-Mujtahid*, *op.cit.*, vol. 2, p. 309; al-Zuḥayli, *op.cit.*, vol. 5, p. 779.

[53] *Al-Mawsūʿa al-fiqhiyya*, vol. 35, p. 304.

[54] Mālik Ibn Anas, *al-Mudawwana*, *op.cit*, vol. 6, p. 176.

5.3.2.1.4.5 THE PERIOD OF AN ANNOUNCEMENT:

The finder is required to make an announcement for the stray article for the period of one year; this was confirmed in Zaid's *ḥadīth*, "...then make announcement of that for a year." Because within this period (one year) the caravans exercise their activities during winter and summer[55]; the merchant who has dropped his article would normally be back to the place where he thinks he had dropped it before the end of the so-called year[56]. The announcement takes place at the doors of mosques and markets and at the place where he finds the article as the owner may come back to that place. In addition, as mentioned by al-Nawawi, such announcement could be made in programmes in radio station that deals with stray articles[57], as well as at police stations, because they may have a section that deals with such problems. The announcement during that year should be carried out as follow: twice at the beginning of the year, then once a day, once a week, and eventually once a month[58].

Ḥanafi and Māliki jurists adhere to the view that the announcement is not obligatory on the finder of the article, that theft punishment (*ḥadd al-sariqa*) does not apply and that is when the article is worth less than quarter of dīnār, according to Māliki scholar or ten dirhams according to Ḥanafi scholars, such

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[55] Ibn Qudāma, *op.cit.*, vol. 8, p. 293.
[56] *Ibid*, at 294.
[57] Al-Nawawi, *al-Majmūʿ*, *op.cit.*, vol. 15, p. 259.
[58] *Ibid*; al-Zuḥayli, *op.cit.*, vol. 5, p. 778.

view is confirmed by Aisha, the Prophet's wife, peace and blessing be upon him, as she said that they did not cut off the hand for small article. And also The Prophet, peace and blessing be upon him, gave permission in stick, lash and robe and the likes of it (robe), picks up by a man for his benefit.

However Shāfiʿi jurists hold the view that if the object is nominal there is no obligation to make an announcement as "The Prophet passed a date fallen on the way and said, Were I not afraid that it may be from a *ṣadaqa* (charitable gift), I would have eaten it." However, Ibn Qudama believes that the general rule of the aforesaid Zaid's *ḥadīth* should be kept and adopted[59]. On the other hand, al-Kāsāni believes that if the article is worth ten dirhams or more the announcement should be made for a year, but if it is less than ten dirhams the announcement should be made only for days as the finder decides[60].

If the announcement is not done within a year, the finder is considered to be committing a sin, because according to Zaid's *ḥadīth*, the Prophet, peace and blessing be upon him, has ordered the announcement to be made immediately after the article has been picked up[61].

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[59] Ibn Qudāma, *op.cit.*, vol. 8, p. 297.

[60] Al-Kāsāni , *Badā'iʿ*, *op.cit.*, vol. 6, p. 306.

[61] Ibn Qudāma, *op.cit.*, 297-8.

5.3.2.1.4.6 WHEN AN ARTICLE IS FOUND AT DESERT:

Shāfiʿi scholars believe that the stray article, picked up at desert, is to be made public at the arrival destination of the finder; whilst the Ḥanbali[62] scholars and Māliki[63] scholars believe that such article should be made public at the nearest city to the place where the stray article was found[64]. If someone picks up an article between two cities, he should make announcement between these two cities, and if he finds it in a city that is occupied by non-Muslims (*dhimmi*), that is to say Christians or Jews, then he has to make announcement there[65].

5.3.2.1.4.7 THE EXPIRATION OF THE YEAR OF ANNOUNCEMENT:

When the year of announcement expires the finder is entitled to possess the article; this is the opinion of the majority of Muslim scholars[66]. Ḥanafi scholars, however, believe that if the finder is poor he is entitled to possess it; otherwise he should feed the poor (*yataṣaddaq*). Mālik scholars adhere to the opinion that the finder should feed the poor[67]. However, even though the finder keeps the stray article, once the owner comes and claims it, he is entitled to it if it still exists; if not he is entitled to consideration; this is the opinion of the majority of

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[62] Al-Bahūti, *al-Rawḍ al-Murbiʿ*, *op.cit.*, vol. 2, p. 265.
[63] Mālik Ibn Anas, *op.cit.*, vol. 6, p.175.
[64] Al-Bahūti, *al-Rawḍ al-Murbiʿ*, *op.cit.*, vol. 2, p. 265.
[65] For details about this point see Ibn Qudāma, *op.cit.*, vol. 8, p. 321-22.
[66] For details see, Ibn ḥazm, *al-Muḥalla*, vol. 8, pp. 266-270; Ibn Qudāma, *op.cit.*, vol. 8, p. 299301; al-Nawawi, *al-Majmūʿ*, *op.cit.*, vol. 15, p. 266-67.
[67] Mālik Ibn Ans, *op.cit.*, vol. 6, p. 173.

scholars, because they draw such judgement from a *ḥadith* narrated by the Prophet, peace and blessing be upon him, in Ṣaḥīḥ Bukhārī, when he said: "Remember the description of its container and the string it is tied with, and make public announcement about it for one year. If the owner shows up, give it to him; otherwise, do whatever you like with it." Also in Ṣaḥīḥ Muslim, "... and if someone comes one day to make demand of that, then pay that to him." Such rule applies on both, Muslims and non-Muslims (*dhimmi*)[68].

5.3.2.1.4.8 REWARD (*JU'L*) FOR THE FINDER:

Muslim Scholars also believe that if there is a reward for anyone who finds a stray article, the finder is entitled to such reward; this is permitted under the Islamic law, and proof for that is to be found in the Noble *Qur'ān*, where Allah says: "*They said: We miss the great beaker of the king; for him who produces it, is (the reward of) a camel-load; I will be bound by it*"[69].

5.3.2.1.5 THE FINDER IS BOUND TO PRESERVE A FIND:

The finder is required to preserve the stray article until the owner shows up, and he is held responsible if such article is damaged or lost as a result of his negligence. However, if the damage or loss is caused by force majeure, he is

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[68] Al-Nawawi, *al-Majmū'*, *op.cit.*, vol. 15, pp. 276, 283; al-Bahūti, *al-Rawḍ al-Murbi'*, *op.cit.*, vol. 2, p. 305.
[69] *Qur"ān* XII: 72.

immune from any liability[70]. This is because the stray article, during the year of announcement, is entrusted to him, as the Prophet, peace and blessing be upon him, said in another narration of the aforesaid Zaid's ḥadīth: "He should make announcement of that for a year, and if its owner does not turn up, then it is a trust with you"[71].

As aforementioned, Māliki and Shāfiʿi scholars believe that it is obligatory to pick up a stray object if the finder fears that it may be lost if he ignores it[72]. Therefore, the Māliki scholars believe that the finder is entitled to reimbursement for the expense he has spent, as a result of protecting the article even without the permission of the judge[73]. Ḥanafi and Shāfiʿi scholars believe that picking up a stray article is not obligatory, hence the finder should bear the expenses of protecting the article, because he has volunteered to do so (*mutabarriʿ*). If the finder wants to be reimbursed he should take permission from judge before doing so[74].

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[70] Ibn-Qudāma, *op.cit.*, vol. 8, p. 316; Al-Nawawi, *al-Majmūʿ*, *op.cit.*, vol. 15, p. 254; al-Bahūti, *al-Rawḍ al-Murbiʿ*, *op.cit.*, vol. 2, p. 266.

[71] *Al-Mawsūʿa al-Fiqhiyya*, *op.cit.*, vol. 35, p. 300.

[72] *Ibid*, pp. 295-4; Ibn Rushd, *Bidāyat al-Mujtahid*, *op.cit.*, vol.2, 304.

[73] Mālik Ibn Anas, *op.cit.*, vol. 6, p. 176.

[74] Al-Shafiʿi, al-Umm, vol. 4, p. 68; *al-Mawsūʿa al-Fiqhiyya*, *op.cit.*, vol. 35, p. 304.

If the stray article is suitable for hire, the judge is entitled to allow the finder to rent it in order to cover his expenses; however, if the judge thinks that the expenses of protecting a stray object may exceed the value of the object itself, he is authorised to let the finder sell the object and keep the money until the owner appears[75].

If the article is perishable, the finder is entitled to sell it after taking permission from the judge[76], this is the opinion of the majority of Muslim scholars.

Because the finder is considered a trustee and so to keep the article safe during the period of one year, he is not entitled to do commercial transactions with it, because in allowing himself to do so means holding back the article and that may cause it to be lost or damaged. So, if the finder violates such trust and makes commercial transactions, he is, according to Muslim scholars, responsible for any damage, and if he succeeds in his transaction during the said period of one year, he should return the stray article with its profit[77].

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[75] *Al-Mawsū'a al-Fiqhiyya*, *op.cit.*, vol. 35, p. 304.

[76] Al-Nawawi, *al-Majmū'*, *op.cit.*, vol. 15, pp. 282-83.

[77] Ibn Qudāma, *op.cit.*, vol. 8, p. 314.; *Al-Mawsū'a al-Fiqhiyya*, *op.cit.*, vol. 35, pp. 303-4.

5.3.2.1.6 THE POSITION UNDER THE RULES OF OLERON:

There are some provisions under the ROO that are similar to that recognised under the *Sharī ʿa*, that place an obligation on the rulers of provinces to save the sunken objects, and deprive them from preventing mariners and merchants from saving their properties. In addition, there is an obligation placed upon the rulers to assist mariners and merchants in saving their goods; for such assistance they are only entitled to just reward for those contribute in salvage. Hence, Article 29 states:

> ... the lord of that place or country, where such misfortune shall happen, ought not to let, hinder, or oppose such as have so escaped, or such to whom the said ship or vessel, and her lading belong, in using their utmost endeavours for the preservation of as much thereof as may possibly be saved. But on the contrary, the lord of that place or country, by his own interest, and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners, in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint; notwithstanding what promises may in that case have been made to the salvors by such distressed merchants and mariners, as is declared in these laws; ...

Furthermore, according to Article 30:

If a ship or other vessel entering into harbour, happens by misfortune to be broken and perish, and the master, mariners and merchants, which were on board her, be all drowned; and if the goods thereof be driven ashore, or remain floating on the sea, without being sought after by those to whom they belong, they being ignorant of this said disaster, and knowing nothing thereof in this most lamentable case, the lord of that place or country ought to send persons to save the said goods, which he ought to secure and to put into safe custody; and give the relations of the deceased persons who were drowned, notice of it, and to satisfy for the salvage thereof, not out of his own purse, but of the goods saved, according to the hazards run, and the pains taken therein; and what remains must be kept in safe custody for one year or more; and if in that time they to whom the said goods appertain, do not appear and claim the same, and the said year be fully expired, he may publicly sell and dispose thereof to such as will give most, and with the monies proceeding of the sale thereof, he ought to give among the poor, and for portions to poor maids, and other charitable uses, according to reason and good conscience. But if he assumes the said goods either in whole or in part unto himself, he shall incur the curse and malediction of our mother the holy church, with the aforesaid pains and penalties, without ever obtaining remission, unless he make satisfaction.

Also Article 46 maintains that:

If any ship, or other vessel, by any casualty or misfortune happens to be wrecked and perish, in that case, the pieces of the hulk of the vessel, as well as the lading thereof, ought to be reserved and kept in safety for them to whom it belonged before such disaster happened, notwithstanding any custom to the contrary…

Pardessus argued that the aforementioned provisions could not be basic judgments nor legislations were applied in France, as there were no law or custom that indicated such system in accordance with the preceding Articles[78].

Basically, the significance of the preceding provisions is comparable with what is confirmed under the *Sharī'ʿa* law; this can be indicated in the following points[79]:

First, these provisions do not authorize both the finder and the rulers of the provinces to possess the shipwrecked goods.

Second, the provisions assert the obligation to make notification by making announcement in order to notify the relatives of the deceased persons, who were drowned.

Third, Article 46 does not put time bar for the owners of the shipwrecked goods to claim their goods, and Article 30 orders the rulers to sell the goods after the

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[78] Pardessus, *op.cit.*, vol. 1, p. 351.
[79] Rajab, M.M., *op.cit.*, p. 164.

period of one year is expired and use the money for charity or as mentioned in the provision "… to give among the poor, …"

It is obvious that the Rules of Oleron include several provisions that indicate the importance to return the goods that were jettisoned, in order to lighten the vessel; thus Articles 33, 43, 45 include provisions that are similar to the rules adopted by Muslim scholars[80].

Article 33 orders the finder to make restitution of the goods that were cast overboard to the owner when such goods were in chests well locked; if the owner does not appear within the period of one year, the finder is required to "put them to pious uses." Article 43 permits the finder to keep the goods that is not claimed due to its insignificant value, "In all other things found by the sea side, which have formerly been in the possession of some one or other, as wines, oil, and other merchandize, although they have been cast overboard, and left by the merchants, and so ought to appertain to him that first finds the same." Moreover Article 45 places an obligation on the finder to restore cables and anchors: "if there were any buoy at them," consequently, "every master of a ship shall cause to be engraved, or set upon the buoys thereof, his own name, or the name of his ship, or of the port or haven to which she belongs: and such as detain them from him shall be reputed thieves and robbers."

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[80] *Ibid*, at p. 165.

It is worth mentioning that Article 30 and 31 of the ROO ignore any custom that permits the rulers to share the saved monies and, furthermore, it prescribes punishment against any person to gain the saved monies, apparel and other goods.

Pardessus was surprised from the aforesaid rules, which were included in the ROO, and he asserted that they were not issued by any French court. He claimed[81] that by looking at the French rulings, even when the civilisation was flourishing and the power of the king was extended, as Lewis XIV took the responsibility to protect sunken persons, we did not find such strict punishments that were embraced in the ROO against the rulers of provinces who had arranged with others to sink vessels and share the wreck resulting from such crimes.

5.3.2.1.7 THE POSITION UNDER THE CONSULATE OF THE SEA:

Article 252 includes some provisions that are similar to what is confirmed by the Islamic law, regarding the duty of the finder. The finder is required to present the salvaged goods to the local authority within ten days, and the rulers

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[81] Pardessus, *op.cit.*, vol. 1, p. 318.

of the provinces are required to keep such goods for a year and one day; however, if such goods are perishable, they should sell them and keep the price until the owner emerges.

If the finder fails to present the salvaged goods to the local authority within ten days, "they [finders] shall be compelled to surrender the salvaged cargo under the circumstances mentioned before and treated as thieves in order to prevent them from disposing of the cargo in an arbitrary manner." In this case, the finder(s) "shall also lose all the rights they formerly had to the cargo that they had salvaged." However, "If after the time set by the local authority or established by custom the rightful owner does not appear to claim such cargo, and no other person presents a claim against such a cargo, the town crier shall be ordered to make a daily announcement of this matter for thirty days."

It seems that the foresaid Article 252 is similar to what is confirmed by the Islamic law; thus the stray article (salvaged goods) should be kept safe for a period of one year, and if it was perishable then should be sold, "If the salvaged cargo would be of a variety that might spoil, it shall be sold and the money received for it shall be kept for the above mentioned period." In addition, an announcement should be made in order to notify those who have rights to those goods and inform them that they are kept safely.

Although Muslim scholars require that the finder should make an announcement and protect the goods until the owner appears, Article 252 places this obligation on the local authority; however, this Article has added: "If the finder or finders of such cargo used it as a collateral for some transaction and made a profit, but in spite of this demanded that they be allowed to retain the salvaged cargo, they shall be rewarded as the custom directs. Any profit they made by the use of the cargo as collateral or in some other manner shall be subtracted from the amount of their award." Consequently, the finder is entitled to keep the goods and benefit from it. It seems that the writer of the Consulate of the Sea borrowed such rules that were confirmed by Muslim scholars; however, due to the prevalent custom in European harbours that the rulers seized any wreck, the writer did not realise such difference; hence, falling into error[82].

5.3.2.2 THE RIGHTS OF THE FINDER (AL-MULTAQIṬ):

5.3.2.2.1 UNDER THE ISLAMIC LAW:

Ḥanbali scholars adhere to the view that the finder is entitled to use an article which is nominal and does not attract the interest of people, that is to say it is very cheep; they confirmed this opinion by the *ḥadīth* narrated by Jabir Ibn Abdullah, in which he said: "The Apostle of Allah, Peace and Blessing be upon

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[82] Rajab, M.M., *op.cit.*, p. 166

him, gave us licence to use (for our purpose) a stick, a rope, a whip and things of that type which a man picked up; he may benefit from them." In addition Anas narrated that: "The Prophet, Peace and Blessing be upon him, passed a date fallen on the way and said, Were I not afraid that it may be from a *ṣadaqa* (charitable gift), I would have eaten it." Furthermore if a finder benefits from a cloth or anything that is of no interest to people, and which one does not have to pay for or bring its replacement (*badal*), does not have to reimburse the owner if he appears[83].

The finder is entitled to use stray article during the year of announcement if such article is perishable; yet he has to pay its value to the owner at his presence[84]. When the year of announcement is expired, the finder can either keep the article with him or give it to a poor; however, if he gives it to a poor or possess it he is required to reimburse the owner when he appears[85].

Ḥanafi scholars do not permit rich people to possess a stray article, even after the year of announcement is expired; they consolidate their opinion with what is mentioned in the *Qur'ān*: "*And do not eat up your property among yourselves for vanities,*"[86] and, "*but do not transgress limits; for Allah loveth*

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[83] Ibn Qudāma, *op.cit.*, vol. 8, pp. 295-6; al-Bahūti, *al-Rawḍ al-Murbiʿ*, *op.cit.*, vol. 2, pp. 264-5; al-Kāsāni, *op.cit.*, vol. 6, p. 307.

[84] Al-Nawawi, *al-Majmūʿ*, *op.cit.*, vol. 15, pp. 278.

[85] Ibn Qudāma, *op.cit.*, vol. 8, p. 299.

[86] *Qur'ān* II:188.

not transgressors"[87] and in the *ḥadīth*: "The stray article is not permitted, if someone picks up a stray article he should make announcement, if its owner appears he should return it to him, if not he should give it to charity." Therefore, Ḥanafi scholars have stated that because the Apostle of Allah , Peace and Blessing be upon him, ordered to give stray item to charity after the end of the year of announcement, the finder is not entitled to possess a stray article if he is rich, because the charity is only given to poor people[88].

Shāfiʿi scholars, however, hold the view that the finder is not required to give stray object to charity after the year of announcement; they claim that the finder cannot be asked to give stray article to charity and afterwards to reimburse the owner when he emerges[89].

If the finder takes permission from the judge to spend money in order to preserve a stray item, he is entitled to keep such item until the owner reimburses him; this is like a vendor who keeps the sold item until he collects his money, and if the owner of *luqaṭa* refuses to reimburse him the judge can permit the finder to sell the item in order to recover his expenses[90].

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[87] *Ibid*, II:190.

[88] Al-Nawawi, *al-Majmūʿ*, *op.cit.*, vol. 15, pp. 263-4; al-Kāsāni, *op.cit.*, vol. 6, p. 307.

[89] Al-Shāfiʿi, *al-Umm*, vol. 4, p. 67.

[90] Al-Kāsāni, *op.cit.*, vol. 6, p. 308.

5.3.2.2.2 UNDER THE CONSULATE OF THE SEA:

Article 252 stipulates that if the owner of the salvaged goods appears, it is obligatory to deliver them to him and the finder is entitled to a fair reward, determined by experts at the place where these goods were salvaged. If he can prove that the cargo belongs to him and is anxious to recover all of the salvaged cargo, he shall pay the finder all the expenses and costs incurred in recovering this cargo, and the amount shall be determined by the local authorities and arbitrated by two trustworthy Elders." If the owner of the salvaged goods does not appear and claim his goods within a year and one day, "the local authorities shall present the finder of such cargo half of it. The remainder shall be divided into two equal parts. One part shall be retained by the local civil authority, and the other part shall be offered for the glory of God to an institution that shall be in need and where they will pray for the soul of the original owner of the cargo."

It is apparent that the writer of the Consulate of the sea found in the Islamic jurisprudence books that the finder is entitled, after the expiration of the so-called year, to possess the salvaged goods or to give it to charity, because the common custom in European ports was recognised that the rulers of provinces had jurisdiction over a portion of wrecks; hence the writer of the Consulate of the Sea tried to reconcile between these matters, that is why he made the preceding division.

5.3.2.3 THE LIABILITY OF THE FINDER:

5.3.2.3.1 UNDER THE ISLAMIC LAW:

When the finder picks up the stray item with the intention to possess it, without making announcement as required, he has inevitably committed a forbidden act. He is not entitled to possess it in this way; if he does so, he is obliged to protect such item, even if he is not negligent. Further he cannot possess it afterwards if he makes an announcement, because he possesses a property of a third party (*al-ghayr*) illegally, he is actually a usurper (*ghāṣib*)[91].

The finder who picks up a stray article with the intention to keep it and return it to its owner is a trustee (*amīn*); therefore, he is not liable for any loss or damage during the year of announcement, as long as he is not negligent; nonetheless, he is liable for any consequences after the so-called year even if he is not negligent, as the stray article comes to his possession, consequently he is liable to give similar article (*mithli*) or its value[92].

A dispute was raised among Ḥanafi scholars regarding the way to determine whether the finder picks up the article to possess it or to keep it for its owner. Abu Ḥanīfa believes that if the finder picks up the article, without providing witness, and says: I (the finder) pick it up to preserve it but the owner refuses to

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[91] Ibn Qudāma, *op.cit.*, vol. 8, p. 307; al-Kāsāni, *op.cit.*, vol. 6, p. 305; al-Bahūti, *al-Rawḍ al-Murbi'*, *op.cit.*, vol. 2, p. 265; Ibn Rushd, Bid*āyat al-Mujtahid*, *op.cit.*, vol. 2, p. 309.
[92] Ibn Qudāma, *ibid*, p. 313.

believe me, so the finder should assume any consequences; this is because according to Abu Ḥanīfa providing witness is obligatory when the finder picks up stray article as the Apostil of Allah, Peace and Blessing of Allah be upon him, said: "He who finds something should call one or two trusty persons as witnesses and not conceal it or cover it up; then if he finds its owner he should return it to him, otherwise it is Allah's property which He gives to whom He will."

However, other scholars believe that the finder does not assume such responsibility and in the event of a dispute it is the saying of the finder with his oath[93].

The finder is entitled to benefit from a find (*luqaṭa*) or even sell it, if it is perishable. Yet, he is required to keep the price until the owner emerges, if he does not do so and the find gets damaged, he is liable for compensation[94].

5.3.2.3.2 UNDER THE CONSULATE OF THE SEA:

Article 252 adopts similar rule established under the Islamic law. The finder who cannot confirm that he picks up a find to preserve it for its owner is a usurper (*ghāṣib*) and he will not be entitled to the find (*luqaṭa*). The preceding Article states:

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[93] For great discussion about this point see, al-Kāsāni, *op.cit.*, vol. 6, pp. 305-6; *Al-Mawsūʿa al-Fiqhiyya, op.cit.*, vol. 35, pp. 300-01; al-Zuḥayli, *op.cit.*, vol. 5, p. 770-71.

[94] See, al-Nawawi, *al-Majmūʿ, op.cit.*, vol. 15, pp. 281-83.

If they [finder(s)] should fail to report this matter to the proper authority within ten days, they [finder(s)] shall be compelled to surrender the salvaged cargo under the circumstances mentioned before and treated as thieves in order to prevent them from disposing of the cargo in an arbitrary manner. They shall also lose all the rights they formerly had to the cargo that they had salvaged.

5.3.2.4 CLAIMING THE WRECK OR LUQAṬA:

Once the owner emerges the finder is bound to surrender the find to him, but if many people come forward and claim their possession of the preceding article, to whom the finder should surrender the article? The scholars provide various solutions to this argument:

5.3.2.4.1 MĀLIKI SCHOOL:

According to the Maliki school, the finder is bound to surrender the find to anyone who can describe its container and strap by which it is tied, also its quantity and weight[95]. If many people come and describe it, the following should be followed[96]:

The one who gives full description is preferable to others. If one contends his possession of a find and manages to describe it but does not take it, and, later, another one arrives and gives the same description, the find is divided between

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[95] Mālik Ibn Anas, *op.cit.*, vol. 6, p. 174.
[96] Al-Kharashi, *Sharḥ Mukhtaṣar Khalīl*, vol. 5, pp. 121-22.

them equally, on condition they take an oath they possess it. If two persons give precise description but could not determine the time of lost, a find is divided between them on condition they take an oath they possess it; if one gives earlier date to the lost it should be handed to him.

If a man claims a find but manages to give only one description of the item and declares his ignorance of other descriptions, in this case a find should not be given to him; if another person comes forward and gives more details, then a find should be handed to him. However, if no one comes to claim a find, it should be surrendered to the first one. If one gives more descriptions than that of the finder, he should be trusted and given a find; nonetheless, if otherwise the scholars hold different opinions.

5.3.2.4.2 ḤANBALI SCHOOL:

The finder should surrender a find to the one who describes it as required, whether he is suspicious or sure about a seeker, and he (seeker) does not need testimony (*bayyina*) or oath to prove his claim in order to take a find. This is confirmed by the Apostle of Allah, Peace and Blessing of Allah be upon him, when he was asked about a find he said: "Make it known for a year. If its seeker comes, deliver it to him; otherwise note its container and its string. Then use it; if its seeker comes, deliver it to him." And the finder is not entitled to surrender a find to one who does not provide the required description, even if it

appears that he is honest, if he does so he should get it back[97]. If two or more people describe a find or establish testimony for their possession to it, in this case they should cast lots between them, the winner should take an oath that he possesses the find, then it should be handed to him. If one comes later and seeks for the same find, he cannot claim it because there is no justification to dispossess it from the one who has taken it at the first place[98].

5.3.2.4.3 ḤANAFI & SHĀFI'I SCHOOLS:

The finder is not bound to surrender a find to a seeker unless the latter proves his possession to it. A finder is liable for any damage or loss of a find if he surrenders it to other than its real owner. Ḥanafi scholars hold the view that if a seeker describes a find, but could not establish his possession to it, the finder is entitled either to surrender it to a seeker or ask a seeker to provide surety (*kafil*)[99]. Shāfi'i scholars believe that the finder should take a permission from a judge in order not to be liable for any consequence when he surrenders a find to a seeker. If the finder does not do so, he may be liable if another seeker comes later, describes a find and claims his possession[100].

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[97] al-Bahūti, *al-Rawḍ al-Murbi'*, *op.cit.*, vol. 2, p. 265-66; al-Nawawi, *al-Majmū'*, *op.cit.*, vol. 15, p. 269; al-Zuhayli, *op.cit.*, vol. 5, p. 780-81.
[98] Ibn-Qudāma, *op.cit.*, vol. 8, p. 311.
[99] Al-Kāsāni, *op.cit.*, vol. 6, p. 307.
[100] Al-Shāfi'i, *al-Umm*, vol. 4, pp. 66-7.

5.3.2.4.4 THE CONSULATE OF THE SEA:

Article 252 states some rules which are similar to the *Sharī'a* rules, regarding claiming a find, it states:

If a party claims that such cargo had belonged to him and makes a deposition under oath that such cargo is his and had belonged to him, it shall be given to him provided that the party who found and salvaged the cargo is willing to return it to him and is given an award the amount of which shall be decided by the finder; if the finder refuses to return the cargo to the party who claims he is the rightful owner, he cannot be forced to do this by the authorities, unless the claimant would be able to prove with the aid of trustworthy witnesses that the cargo had belonged to him.

5.3.2.5 THE RIGHTS OF THE OWNER OF THE WRECK (LUQAṬA):

The owner of a find is entitled to recover his article even after the year of announcement has expired. Māliki scholars believe that if the finder possesses a find, after the year of announcement has expired, and afterward it gets lost or damaged, the owner has the option either to take it as it is or claim its value, at the time such article comes to the finder's possession. However, if a find is sold or given to a charity, after the year of announcement has expired, the owner is

only entitled to claim its value[101]. On the other hand, other scholars believe that the owner is entitled to recover his article, if the finder has sold it or has given it as a gift (*hiba*), after he made an announcement; but he can only claim another article similar to his or take its value[102].

When the owner recovers his article he recovers it with its attached increment (*namā' muttaṣil*), if such increment is isolated (*namā' monfaṣil*) to the article then it is for the owner[103].

5.3.3 SALVAGING PROPERTY AT SEA:

Muslim scholars hold the view that the finder is not entitled to possess either floated or sunken goods at the time of salvage. The ownership of such goods remains to those who had entitlement over these goods before it had sunk. Consequently, the finder is bound to make announcement and preserve them until the owner emerges. As regards the reward for the finder, there is disagreement among scholars over such contention, as we shall explain below.

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[101] Ibn Qudāma, *op.cit.*, vol. 8, p. 313.
[102] *Ibid.*
[103] *Ibid.*

5.3.3.1 MĀLIKI PERSPECTIVE:

They adhere to the view that the finder is entitled to expenses he incurred due to salvaging the goods in addition to a reward (*ajr*) for his performance. When a ship is sunk at sea, and the ship carries oil then such oil floats; subsequently a man comes and collects it, such oil remains for the owner and the one who provides the service of salvage is entitled to a reward (*ajr*)[104].

5.3.3.2 SHĀFI ʕI PERSPECTIVE:

Shāfiʿī scholars believe that the salvor is not entitled to a reward even if he has spent money for salvage and rescued it from usurper. However, the old scholars were in favour of giving the salvor a reward on the condition that he should provide a witness that when he spent money he intended to claim it from the owner of goods[105].

5.3.3.3 ḤANAFI PERSPECTIVE:

They hold the view that giving a reward under the aforesaid circumstances is regulated by customs. If the custom adopted considers that the one who does

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[104] Al-Khafīf, Ali, *al-Ḍamān fi al-Fiqh al-Islāmi*, vol. 1, p. 35.
[105] *Ibid*, vol. 1, p. 38.

such work or endeavour does not claim a reward, then the salvor is not entitled to any reward; however, if otherwise, then it should consider whether the salvor has jurisdiction over such work like the guardian (*waṣi*) or trustee, and if so he is entitled to reward[106]. If he does not have jurisdiction, like the one who sees property in danger due to fire, water or theft, and subsequently he salvages it with endeavour, in these circumstances, there is disagreement among ḥanafi scholars with regard to a reward.

Some scholars hold the view that he is considered as a volunteer (*mutabarri ʿ*). Others believe that he is authorized to salvage the property following the custom; thus the salvor is entitled to reward, in addition to the expenses he incurred and that is determined according to the custom. It is noteworthy that in order to be entitled to the preceding reward the salvor should perform such rescue mission at the absence of the owner, because, if otherwise, he is deemed as a volunteer[107].

5.3.3.4 ḤANBALI PERSPECTIVE:

They believe that it is essential to reward the salvor in order to encourage people to save property of the third party (*al-ghayr*), when it is in danger. The salvor should be entitled to reward for his performance. The salvor is not

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[106] *Ibid*, vol. 1, p. 35.
[107] *Ibid.*

entitled to possess the property that is jettisoned at sea. If the ship is stranded and some people salvage its cargo later, they are entitled to claim the expenses they incurred and a reward for their performance[108]. In fact the need for reward is much more required nowadays[109], that is applicable nowadays.

5.3.3.5 THE RHODIAN SEA LAW:

The RSL contains three provisions that are similar to the Muslim scholars' opinion. Accordingly, the salvor is not entitled to possess the salvaged property; he is bound to return it to the owner and he is entitled to reward. However, there is a difference between them regarding the reward. According to Muslim scholars, the salvor is entitled to fair reward, whilst under the RSL the salvor is entitled to a portion of the salvaged goods.

Article 45 of the RSL states: "If in the open sea a ship is overset or destroyed, let him who brings anything from it safe on to land receive instead of reward the fifth part of that which he saves"[110]. Article 46 adds: "A boat breaks the ropes and gets off from its ship and is lost with all hands. If those on board are lost or die, let the captain pay their annual wages for the full year to their heirs. He who saves the boat with its rudders will give them all back as he in truth

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[108] Al-Bahūti, *al-Rawḍ al-Murbiʿ*, *op.cit.*, vol. 2, p. 266.

[109] Ibn Qudāma, *op.cit*, vol. 8, p. 323, *Al-Mawsūʿa al-fiqhiyya*, vol. 35, p. 306.

[110] Ashburner, W., *The Rhodian Sea-Law*, (Oxford: Clarendon Press) (1909), pp. 117-18.

finds them and receive the fifth part of what he saves"[111]. Finally Article 47 maintains: "If gold or silver or anything else is raised from the sea from a depth of eight fathoms, let the salvor receive one-third. If it raised from a depth of fifteen fathoms, let the salvor receive one-half by reason of the danger of the sea. Where things are cast from sea to land and found there or carried to within one cubit of the land, let the salvor receive one-tenth part of what is salved"[112].

5.3.3.6 THE RULES OF OLERON:

According to the ROO, no agreement made between merchants and mariners at the time of a wreck is valid; however, the mariners are entitled to a proportion fixed by the court. Thus Article 4 states: "And if he [master] has promised the people who helped him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, and reward them accordingly, without any regard to the promises made to them by the parties concerned in the time of their distress."

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[111] *Ibid*, p. 118.
[112] *Ibid*, pp.118-19.

5.3.3.7 THE CONSULATE OF THE SEA:

The Consulate of the Sea includes provisions that are similar to what is recognized under the Islamic law. Article 252 maintains: "If it should happen that the cargo should be found at the bottom of the sea because it is too heavy to float on top of the water, it should not be sold or disposed of in any other manner, because cargo salvaged from the bottom of the sea shall be kept until claimed by its owner. The party who salvaged such cargo shall be amply rewarded according to the determination made by the local civil authority and two members of the Sea Guild who are trustworthy and who will be capable of arbitrating the issue judiciously. The civil authority shall place the cargo on public display and retain the money realized from the sale of such cargo, if such cargo was in danger of spoilage, ..." In a further paragraph, the preceding article states: "If the cargo had been found and salvaged after an interval of one year and a day from the date it had been lost, its owner cannot make any claim upon it, and it should be adjudged the property of the party or parties who found it."

Article 160 maintains: "Should a sailor find any object during the period of his enlistment, the vessel shall be entitled to three parts and he to one part of the salvage... The patron of a vessel is entitled to such a large part of the salvage because he feeds and pays the wages of the crew." This Article contradicts what is mentioned in the aforesaid provisions of the Consulate of the Sea, at the

time the aforementioned provision maintains to preserve the goods throughout a year until its owner emerges, Article 160 entitles the finder to possess the goods once he finds it. It seems that the writer of the Consulate of the sea has confused between what was deemed as a custom at the European ports, namely that the ruler has the right to possess a find or goods, and between what might be borrowed from the Islamic jurisprudence to maintain the goods for a period of one year.

5.3.4 SALVAGING THE VESSEL:

5.3.4.1 SHARĪʿA PERSPECTIVE:

In comparison with salvaging the property or wreck, there are not many discussions about the salvaging of the vessel. This is justified by the fact that during the medieval ages the ships used to travel together like caravan in order to protect each other from the pirates. Therefore, if a vessel encounters danger the other vessel provides assistance to it and vice versa; hence, no reward is required between them.

In fact, Muslim scholars hold the view that the salvor does not deserve any reward for rescuing people; however, as for salvaging properties and ships, a dispute is raised between them; one party considers such service as only a

voluntary one, whereas the other party believes that the salvor is entitled to a reward[113].

A case was raised regarding a vessel which took a cargo from Alexandria and sailed with other ships belonging to al-Mahdiyya port; when it came to al-Barqa mountain it was seized by pirates; afterward the pirates' ships were attacked by a ship from Sicily which retook the vessel to Sicily. The question was raised whether or not the salvors were entitled to any right over such vessel and its crew, and whether or not they deserve a reward, and finally, whether or not such dispute can be judged in al-Mahdiyya?

The scholar's answer came as follow: Muslims who save their brothers from enemy are not entitled to reward, but they are entitled to reward for their efforts. The dispute should take place to where the ship was taken if its ruler is just[114].

5.3.4.2 THE CONSULATE OF THE SEA PERSPECTIVE:

Once more, the Consulate of the Sea contains provisions similar to the abovementioned rules confirmed by Muslim jurists. Article 277 stipulates that

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[113] Al-Wansharīsi, *al-Miʕyār al-Muʕrib*, vol. 8, p. 188-89.
[114] *Ibid.*, pp. 302-306.

the vessel that assists other vessel is not entitled to possess the saved vessel.

Article 290 stipulates:

If a vessel after having been captured by an enemy craft is intercepted by a friendly vessel that had come upon the enemy vessel that had made this capture and as a result of this encounter the captured vessel is freed by the friendly unit, regardless of how this had been accomplished, the retaken vessel shall be returned to the owner or owners, together with all the effects aboard, provided the owners are alive, under the condition that the owners reward those who had rescued their vessel sufficiently and proportionally to the amount of trouble and expense they had suffered in doing this.

It further adds:

If the enemy vessel that had taken such a prize noticed another vessel approaching and, fearing an encounter with such a vessel, abandoned the vessel that they had captured, and the vessel that caused the enemy craft to flee put aboard a prize crew on a vessel that had been abandoned, or took this vessel in tow in order to keep the booty, they shall return the retaken vessel to its proper owners provided these are still alive or to their relatives without any delay and reluctance, provided that these relatives will pay those who saved the vessel and all the cargo aboard it a suitable reward, in agreement to what had been stated above, if they can reach a mutual understanding. If the two parties could not reach a compromise, the matter shall be given to the Elders for disposition.

In addition:

If anyone abandons his vessel due to the fear of enemy craft, and another vessel intercepts such an abandoned craft, puts aboard it a prize crew, and sails it to a safe location, this is to mean that those who took such a vessel did not recapture it from an enemy, and the latter had not yet succeeded in taking it away from its rightful owners, such a vessel and its cargo shall not belong to the party who found it; however, the party who found such a vessel under such circumstances may demand a suitable reward in conformity with the well established marine customs.

On the contrary, the aforementioned provisions entitle the one who free a vessel from enemy to possess it, thus it states:

If, however, the friendly vessel was able to retake the captured vessel from the enemies at a location where the friendly vessel had been properly moored and safeguarded, they need not be given a reward unless they themselves wish it, for the whole prize belongs to them, with everything aboard it, and no one can oppose this, and neither the local court of law nor anyone else can and should make any charges or claims against them.

The previous rule contradicts the implication of the aforesaid Articles 277 and 290; as a matter of fact the writer of the Consulate of the Sea did not rationalise such entitlement. This might be justified by the fact that the writers of the COS added this provision mistakenly without considering the aforementioned

provisions that contradict such entitlement; basically, such entitlement is stemmed from the prevailing custom at that time, as explained above, which stressed that any property under such circumstances was deemed as pleasant plunder[115].

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[115] See Benedict, R., *op.cit.*, at p. 234.

6. THE GENERAL AVERAGE (*AL-ʿAWRIYYĀT AL-ʿUMŪMIYYA*, SING. *ʿAWĀRIYA*):

6.1 ORIGIN AND DEFINITION OF THE NOTION OF "AVERAGE"[1]*:*

An *avaria*, in Medieval Latin, is an expense or loss happening in the course of navigation. Basically, the word "*avere*" was found in the *Constitutum*[2] *Usus*[3] of the city of Pisa, a Code dating from 1160 AD; the Code was written in a sort of Italianised or Mongrel Latin. The notion "*avere*" denotes the basis of contribution or contributory value. In another place, it speaks of those whose *avere* (property) has been cast out, and those whose *avere* is safe[4].

The English word 'average' has the same meaning[5]; it seems that the preceding terms have the same origin of the *ʿawāriya*; this word means

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[1] For great illustration about the definition of general average see, Barclay, T., "The Definition of General Average," (1891) 7 *Law Quarterly Review*, 22-42.
[2] An agreement to pay existing debt, see, *Black's Law Dictionary*, *op.cit.*, at p. 307.
[3] The right to use another's property, without the right to the produce of the thing, see, *Black's Law Dictionary*, *ibid*, at p. 1543.
[4] Wilson, D.J. and Cooke, J.H.S., *Lowndes & Rudolf General Average*, (1990) (Sweet & Maxwell), 7. (hereinafter Lownes & Rudolf General Average).
[5] Ashburner, W., *op.cit.*, p. 251.

damaged goods and *'awār* signifying damage at sea and loss[6]. The doctrine of the general average is deemed fundamental in comparison with other maritime law theories; at the time the marine insurance was not known, the general average system allowed parties, interested in the maritime adventure, to bear the value of some goods that they jettisoned, in order to protect the public interest.

At the beginning, the general average was a sacrifice of a portion of cargo, in order to reduce the tonnage of vessel to enable it to continue its maritime adventure. However, due to the development that occurred in the navigation and jettison became uncommon, the concept of general average was changed to the damage that occurred to the vessel, where it required huge effort or enormous expenses that the master had to pay. Basically the losses that operated by the general average were explained by Ashburner; he said: "Losses which may fall on ship or on its tackle or on cargo, and which, wherever they originally fall, from the subject of contribution as between the different parties interested in the maritime adventure"[7]. The word of Lawrence J. in *Birkley v. Presgrave*[8] in 1801 provided improved meaning of general average, he said: "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne

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[6] Tetley, W., "The General Maritime Law – Lex Maritima," (1996) 31 *European Transport Law*, 469 at p. 491; Noble, *op.cit.*, p. 220.
[7] Ashburner, W., *op.cit.*, p. 252.
[8] 1 East 220.

proportionably by all who are interested." This statement has become a sort of benchmark and has been adopted as a test in *Covington v. Roberts*[9], *Job v. Langton*[10] and *Svendsen v. Wallace*[11].

General average continues to exist today in all the world's shipping nations under the York-Antwerp Rules 1994[12]; under Rule A of the foregoing Rules general average is emerged when: "There is an act when (and only when) any extraordinary sacrifice or expenditure is internationally and reasonably made or incurred for the common safety, or the purpose, of preserving from peril the property interested in a common maritime adventure." Undeniably, the development in marine insurance has led to the altering of the old economic procedures; shipowners and consignees insure the entire maritime adventure, hence the general average, by and large, is considered among insurance companies without any interference from those who contribute in maritime adventure. Accordingly, the theory of general average was criticised, thus the leading insurance company "Lloyds" and some legists have demanded to abolish the general average system as it is ineffective[13].

Many international conferences were held in order to amend the system of general average, though they led to extend the domain of its implication;

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[9] (1806) 2 B. & P. (N.R.) 378.
[10] (1856) 6 E. & B. 779, 790.
[11] (1884) 13 Q.B.D. 69, 73 (*per* Brett M.R.)
[12] Tetley, W., *op.cit.*, at p. 491.
[13] Ripert, *Droit maritime*, T. 3, no. 2223.

accordingly the criticisms have recently been directed toward the extension of the implication of the general average[14].

We shall provide a historical perspective of the theory of general average in the ancient laws, and then the principle under the Islamic law will be illustrated in details.

6.2 HISTORICAL PERSPECTIVE:

6.2.1 ANCIENT DOCUMENTS:

It is presumed that the oldest documents known about the general average was dated back to the Phoenicians; the Talmud of Jerusalem includes provision indicating that the Phoenicians exercised jettison in order to save the ship. Each merchant had to jettison a portion of his goods equal to what the other merchant did. If the vessel was forced to jettison goods, the loss was distributed according to the weight of goods owned by each merchant, and not according to its value; such provision does not state if the vessel is shall contribute to such loss[15].

It is presumed that the first known statement of the law of general average was recognised under Greek legislations[16]. It is worth mentioning that the

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[14] Rodière, *Traité général de droit maritime "Evénement de mer"* no. 256.
[15] Dauvillier, "le Droit Maritime Phénician," *Revue de Droit de l'Antiquité*, Bruxelles, 1959, p. 54-55.
[16] *Lowndes & Rudolf General Average, op.cit.*, p. 3.

provisions of the Roman law concerning general average raise many arguments and doubt. Selmer argues that the compensation for jettison so the goods sacrificed shall be established on what they have been bought for, "since the compensation is made for loss sustained, not for expected gain" (Dig. 14.2.2 s. 4); he thinks this statement appears to be out of harmony with the general Roman doctrine[17]. Although the general rules of the Roman law does not recognize the system of sharing[18], Digest, XIV, 2, 'de lege Rodia jurists include some provisions that deal with contribution in general average. Historians assumed that the Romans borrowed these provisions from the Greeks; however, they could not decide in which age these provisions were inserted in the Justinian's Digest, or as described in the famous book 'The Black Book of Admiralty': "there is no provision amongst these decisions which expose them to the suspicion of forgery"[19]. As aforementioned, it is confirmed that the RSL was presented in the medieval ages; consequently, one cannot imagine that these rules existed prior to the eighth century[20]. In reality, there is no clear proof that the rules of contribution were attached to the Isle of Rhode[21].

When the RSL is studied, it seems that the contribution in general average is constituted upon the idea of company or contribution in risk. Nonetheless, such concept is strange to the Roman law, thus many questions were raised

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[17] Selmer, K.S., *The Survival of General Average: A Necessity or an Anachronism*, (Pitmans: London) (1958), p.22.
[18] *The Black Book of Admiralty*, vol. 2, p. xlv.
[19] *Ibid*, at p. xlvi.
[20] See chapter two.
[21] Selmer, K.S., *op.cit.*, at p. 20.

by the historians with this regard and could not provide answers to them. Is it a matter of a company based on agreement or legal company? What are the rules that govern these companies? They could not reach any answers to these questions[22].

In addition, if we say that the Romans, when constituted the contribution to the general average upon the idea of company, it is self-evident to make it subject to the rules of company; but they applied distinguished system from that recognised under the law of company. On the one hand, the owners of goods, which were jettisoned, shall bring suit against the master for his liability for the damage he had incurred; on the other hand, the master shall lodge legal action against the owners of goods that were saved[23].

6.2.2 GENERAL AVERAGE IN ENGLISH LAW:

The first use of the term 'general average' in an English court took place in 1799 in *The Copenhagen*[24], where Lord Stowell commented: "General average is for a loss incurred, towards which the whole concern is bound to contribute pro rata, because it was undergone for the general benefit and preservation of the whole."

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[22] Dareste, "La les Rhodia," Nouvelles Etudes d'histoire du droit, troisième série, Paris, Recueil Sierey - 1906, 185.
[23] *Ibid*, 187-88.
[24] (1799) 1 C. Rob 289.

This was followed by *Birkley v. Presgrave*[25] in 1801; however, in this case the principle of general average was actually not contested at the court, but was considered, in argument, as a thing long established and well recognised. Lawrence J stated: "All loss which arises in consequence of extraordinary sacrifices made or expenditures incurred for the preservation of the ship and cargo comes within general average and must be borne proportionately by all who are interested."

Subsequently, those words were considered as the highest authority in later cases[26].

6.2.3 ISLAMIC LAW JURISPRUDENCE:

When we study the Islamic law we realise that those references include many significant issues about the general average. Muslim jurists are of two opinions: the first include the Shāfiʿi and Ḥanbali scholars who think that it is obligatory to contribute in general average, if an agreement was concluded between the parties at the time of danger. The second opinion is held by the Māliki jurists who established various significant principles in the theory of general average.

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[25] (1801) 1 East 220.
[26] *Covington v. Roberts* (1806) 2 B & PNR 378; *Svendsen v. Wallace* [1884] 13 QBD 69.

The medieval ages period adopts some provisions that deal with general average that are akin to what is understood under the *Sharī ʿa*.

6.3 JETTISON ACCORDING TO THE PERSPECTIVE OF SHĀFIʿI, ḤANBALI & ḤANAFI SCHOLARS:

The Shāfiʿi, Ḥanafi and Ḥanbali scholars adhere to the view that in the event of fear of sinking, goods must be jettisoned in order to save the lives of people. However, they refuse the liability of contribution in loss that resulted from jettison, unless the parties agreed when they face danger.

Ḥanbali scholars compare the merchant who jettisons his property to a person who asks someone to pay a thousand *dīnār* to a third party. Ibn Qudāma holds this opinion[27]: In the event of danger that causes damage to the ship or what it carries or even part of what it carries, and a man jettisons some goods to lighten the ship, under these circumstances, the man who has jettisoned his property is not entitled to claim indemnity from others. If what he has jettisoned belonged to others, he is held liable but not the others; if some passengers told him to jettison his property and he did so, he is not entitled to any indemnity from them. If he is asked by a passenger to

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[27] Ibn Qudāma, *al-Mughni*, vol. 7, pp. 107-8.

jettison his property and the passenger told him that he and other passengers would indemnify him, the one who asked him to jettison his property is liable and will indemnify him but not the other passengers, unless the other passengers do indemnify him voluntarily.

Accordingly, if a merchant jettisons his goods, he is not entitled to claim any compensation for his act. However, if he jettisons some of the goods that belong to others, he is liable to compensate the owners of these goods. Moreover, if a merchant asked another to jettison his goods and the latter agreed, the former is not liable; unless he said to him that he would guarantee to compensate the owner of such goods. If the previous offer was that the merchant would guarantee with other merchants, only the one who offers will guarantee then to compensate others, unless other merchants accept to contribution.

As for Shāfiʿi scholars, they have adopted the same opinion held by Ibn Qudāma mentioned above.[28]

As for the Ḥanafi perspective, they did not differ from the aforementioned opinion; therefore, if someone overboard some shipment of the third party,

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[28] Al-Shāfiʿi, *Mawsūʿat al-Imām al- Shāfiʿi al-Kitāb al-Umm*, vol. 7, p. 303.

in the event of feasible danger, he indemnifies the third party for the loss, unless there was an agreement between the merchants to do so[29].

It is presumed that Shāfiʿi, Ḥanafi and Ḥanbali scholars have established the contribution in the general average and the method of its allocation to their agreement and the time of danger. All parties are required to express their agreement in clear words.

The aforesaid principles were applicable at that time, when merchants were on board the ship; however, the circumstances have changed and the merchants do not accompany their goods on the ship; therefore, such principle is not applicable nowadays. That is why it is more likely to leave the matter of expressing agreement in clear words to the prevailing custom, or even the legislations.

6.4 GENERAL AVERAGE ACCORDING TO MĀLIKI PERSPECTIVE:

Māliki scholars have stated that parties interested in the maritime adventure are liable for general average for the loss derived from three circumstances:

Jettison in order to save the vessel.

Ransom that is paid in order to free the vessel, goods and people on board.

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[29] *Al-Mawsūʿa al-Fiqhiyya*, vol.28, 306.

Damage to goods that belong to several merchants.

These cases are discussed below.

Under this sub-heading we shall discuss the following topics:

The cases of general average.

The conditions of general average.

The priorities in jettison.

Establishing general average.

The settlement of general average.

6.4.1 THE CASES OF GENERAL AVERAGE:

6.4.1.1 JETTISON (RAMI AL-BIḌĀʿA):

Due to weather circumstances, the master is forced to sacrifice some of the goods in order to save maritime adventure. By doing so, the master has damaged the third party's property and he did so intentionally. Under such circumstances, how do Muslims scholars interpret the act of the master?

Māliki scholars believe that the safety of maritime adventure takes priority and even suggest that the master is entitled to overboard goods, in order to save the lives of people. Under this circumstance, the question that comes to surface is: does the master's act is deemed legitimate; therefore, injured party bears the loss?

Muslim's scholars applied the following principles on the previous circumstances. Those principles are:

Necessities permit unlawful act. (*al-ḍarūrāt tubīḥ al-maḥḍūrāt*).

The light harm should be borne in order to push back the serious harm (*yajib taḥammul al-ḍarar al-akhaff li daf' al-ḍarar al-ashad*).

Parrying Harm Takes Priority over Gaining Benefit (*dar' al-mafāsid awla min jalb al-maṣālih*).

Profit follows responsibility (al-kharāj bil ḍamān or al-ghunm bil ghurm).

6.4.1.1.1 NECESSITIES PERMIT UNLAWFUL ACT. (AL-ḌARŪRĀT TUBĪḤ AL-MAḤḌŪRĀT):

It is not permissible to damage the third party's property under any circumstances; however, if a man fears that some harm may be inflicted on him, his property or his family, he is entitled to damage the third party's property, if it is the only way to ward off the harm. But this principle is not left open without any restrictions and conditions, those conditions are summarised as follow[30]:

Necessity is existed and not expected,

The unlawful act is the only option left and there is no alternative,

Unlawful act should not exceed the limit,

The damage from committing unlawful act should be less than the damage that may derive from necessity,

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[30] Shabīr, M., *al-Qawā'id al-Kulliyya wal Ḍawābiṭ al-Fiqhiyya fil Sharī'a al-Islamiyya*, (Amman: Dār al-Furqān) (2000), 313-15.

The act should not contradict *Sharī ʿa* principles namely justice, the rights of the third party should be maintained and the basis of religion preserved,

The judge should emphasise that this is case of necessity; and finally

The permitted time to act unlawfully is restricted by necessity.

One of these cases discussed by scholars is called (*daf ʿal-ḍawāl*) or pushing back the straying beast. Is the one who pushes back the beast liable to compensate its owner if he kills the beast? Ḥanafi, Shāfiʿi and Ḥanbali scholars believe that he is liable to compensate the owner because he has damaged the owner's property; they have compared this case with someone who eats the third party food because he was starving[31]. Whilst the māliki scholars believe that the defendant is not liable to compensate the owner of the beast, because he was forced to do so in order to save his life[32]. Consequently, it is permissible to damage the third party by jettisoning it in order to preserve the ship[33].

6.4.1.1.2 THE LIGHT HARM SHOULD BE BORNE IN ORDER TO PUSH BACK THE SERIOUS HARM (YAJIB

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[31] Al-Khafīf, A., *al-Ḍamān fil Fiqh al-Islāmi*, vol. 1, p.231; Ibn ʿĀbdīn, *al-Durr al-Mukhtār*, vol. 5, p. 215; Ibn Nujaym, *al-Ashbāh wal Naẓāir*, (Cairo) (1968), p.85.

[32] Ibn Ḥazm, *al-Muḥalla*, vol. 11, p.13.

[33] See al-Zarqa, A., *Sharḥ al-Qawāʿid al-Fiqhiyya*, (Dār al –Gharb al-Islāmī) (1983), p. 131.

TAḤAMMUL AL-ḌARAR AL-AKHAFF LI DAF' AL-ḌARAR AL-ASHAD):

Scholars believe that when a person exercises his rights he may harm others' interests just a little, as long as he does not do so deliberately, except for the public interests, which in our case the safety of the ship. So the master managed to avoid serious damages by bearing little damage when he jettisoned some property[34].

6.4.1.1.3 PARRYING HARM TAKES PRECEDENCE OVER GAINING BENEFIT (DAR' AL-MAFĀSID AWLA MIN JALB AL-MAṢĀLIḤ):

When benefit and harm are collided, parrying harm takes priority over getting benefit[35]; in our case, the safety of the vessel and human take precedence, and consequently harm is the jettison, because it will damage goods and the benefit in our case is the safety of the ship and human.

6.4.1.1.4 PROFIT FOLLOWS RESPONSIBILITY (AL-KHARĀJ BILḌAMĀN OR AL-GHUNM BIL GHURM):

Basically the above principle is a sound *ḥadīth.* This principle is fundamental and applicable to most of financial transactions. As a result, if

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[34] Al-Nadawi, A., *al-Qawā'id al-Fiqhiyya*, (Damascus: Dār al-Qalam) (1986), 350-52; Al-Khafīf, A., *al-Ḍamān fil Fiqh al-Islāmi*, vol. 1, p. 98.
[35] Al-Nadawi, A., *Ibid*, 276-80.

someone damages the property of third party he should indemnify the injured party. Therefore, the person who demolishes the third party's wall in order to extinguish the fire in his house and then save his house by damaging the third party's property, he benefits (*ghunm*) from such demolition, and, consequently, he is liable (*ghurm*)[36].

6.4.1.1.5 CONCLUSION:

In the event of jettison, the master sacrifices some shipment in order to preserve maritime adventure, apart from the vessel, and its shipment is owned by one person, the master damages the property of some shippers to save the other's property. In spite of the fact that the act of the master was not permitted, it is a case of necessity that has forced the master to do so, thus *Sharī'a* tolerates this case. By doing so, the master avoided major damage by causing minor loss; this act benefited the parties interested in the maritime adventure, because if the master did not jettison some of the goods he was likely to lose the entire ship, including human and property on board. Some losses were incurred from this accident; consequently, anyone who benefited from this maritime adventure should burden part of the loss. This is because they had benefited from the act of the master; therefore, they should be liable for the consequences too.

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[36] Ibn Nujaym, *al-Ashbāh wal Naẓāir*, p. 151,Shabīr, M., *op.cit.*, pp. 316-18, Al-Khafīf, A., *Ibid.*, p. 228.

6.4.1.2 RANSOM THAT IS PAID IN ORDER TO FREE THE VESSEL:

The master is not held accountable for the loss due to force majeure. Therefore, if the master pays ransom to free the ship from the enemy, when the vessel is captured, the parties, interested in the maritime adventure, shall bear such loss[37]. However if the master goes to an unsafe place, despite advance warning from the shipowner or the merchants and, then, the enemy captures the ship, the master is held accountable, and if he pays ransom to free the vessel, he is not entitled for compensation[38].

6.4.1.3 DAMAGE TO GOODS THAT BELONG TO SEVERAL MERCHANTS:

The master is liable for loss due to his act; however, he is not liable for tear and wear (*ʿajz al-ṭarīq*) or loss due to sea water leaking through a ship or a hole in the ship which occurs suddenly. The injured parties shall burden such loss and are not entitled to claim compensation for that loss.

However, if the goods that belong to various merchants are mixed up with each other and incur damage that cannot be attributed to the master, the merchants shall bear the loss. Accordingly, they share the bad and unimpaired goods. On his ruling on a foodstuff on board a vessel, part of it

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[37] Al-Wansharīsi, *al-Miʿyār al-Muʿrib*, vol. 8, p.302-5.
[38] *Ibid.*

was damaged, Imam Mālik said[39]: "when each of the foodstuff was kept separately from other foodstuff, the merchant bears the consequences to his foodstuff, but if the foodstuff, for some reason, was mixed up with each other, shippers shall share what was damaged and lost; each merchant shall take the share according to his shipment."

6.4.2 THE CONDITIONS OF THE GENERAL AVERAGE:

Islamic law states that the master is deemed as a trustee (*amīn*); therefore, he is not liable for damage, unless he commits an error or does an illegal act. Consequently, in the event of force majeure, the shippers bear the loss to their goods. On the other hand, if the master overboard the goods or surrenders it to pirates in order to save the ship, human and shipment, in this case he (master) has benefited parties interested in the maritime adventure. Accordingly, the loss shall be allocated to every party that has benefited from the act of the master. The same rule applies in the event of damage. It seems that in order to have general average case there are two conditions:

Parties interested in the maritime adventure incur damage.

The harm not due to fault.

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[39] Ibn Rushd, *al-Bayān wal Taḥsīl*, vol. 9, p. 93; Murād, A., *Mawsūʿat al-Qanūn al-Bahri*, (Alexandria), p. 64.

6.4.2.1 PARTIES INTERESTED IN THE MARITIME ADVENTURE BURDEN CONSEQUENCES:

In the aforesaid cases considered by Māliki jurists as cases of general average, parties interested in the maritime adventure shall bear the consequences of any damage. Thus, in the case of jettison, the master sacrifices some of the goods in order to save the ship. According to Mālik[40], when a shipment is jettisoned, due to terror (*hawl, faza* ʿ), those whose goods are not jettisoned must share their goods with other shippers, and what have been jettisoned and remained from goods are to be shared by all of them, with its increase (*namā'*) and decrease (*naqṣ*), at the time of purchasing, without partiality (*muḥābāh*), because they save their goods with such act. This act is fair, because no one shall benefit alone from this situation, as they have all survived.

Even though the master sacrifices only the shipment of some merchants, the other merchants are required to share the loss incurred from the master's act, because if he did not do so their goods would not be saved.

As for the ransom that is given to free the ship, shipment and human on board, those who have been involved in such journey should bear it, because

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[40] Ibn Rushd, *al-Bayān wal Taḥsīl*, (Amman: Dār al-Gharb), (1988, 2nd edn.), vol. 9, pp. 85-87; al-Nafrāwī, A., *al-Fawākih al-Dawāni*, (1955, 3rd edn.), vol. 2, pp. 63-64; Murād, A., *op.cit.*, pp. 62-3.

they were in danger, the ransom paid by the master help them survive, and, therefore, they should all bear part of such ransom[41].

As for the damage inflicted on the goods owned by several merchants, if the goods were mixed up with each other deliberately or accidentally, and reached the designated location, it is considered as damage without negligence[42].

6.4.2.2 THE DAMAGE NOT DUE TO FAULT:

In order to make loss as the one applied to the general average, it should be caused by force majeure. Scholars state that the master is not liable for the damage caused by force majeure; accordingly, the injured party bears the consequences; and because the parties interested in the maritime adventure incurred loss, they should bear the loss according to their share of goods.

As it is confirmed by the *Sharī'a*, neither the RSL nor the COS considers loss resulting from negligence of master or even of any of merchants, as loss within the course of the general average. According to Article 22 of the RSL, the master shall assume damage due to his negligence, it states:

> Let the captain take nothing but water and provisions and the ropes which ships have need of, where the merchants loads the whole ship according to their written contract. If the captain is minded to put in other cargo after this, if the

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[41] Al-Wansharīsi, *op.cit.*, vol. 8, p. 302-3.
[42] See at p. 256 what Mālik said, Murād, A., *op.cit.*, pp. 64.

> ship has room, let him put it on; if the ship has no room, let the merchants before three witness resist the captain and sailors; and, if there is jettison, it will rest with the captain, but if the merchant does not prevent it, let him come to contribution.

Furthermore, Article 39 of the RSL maintains that whoever deviates from the route should bear the consequences, it states:

> A ship with a cargo of corn or wine or oil is in full sail. By wish of the captain and crew who slacken sail, the ship goes into a place or on a beach against the wish of the merchant. It happens that the ship is lost, but the cargo or goods are saved. The merchant is to suffer no harm from the loss of the ship, since he did wish to go into that place. If while the ship is in full sail, the merchant says to the captain 'I want to go into this place,' and the place is not comprised in the charterparty, and it happens that the ship is lost while the goods are saved, lei the captain have his ship made good by the merchant. If it is by wish of both parties that the ship is cast away, let everything come to contribution.

Again the COS adopts provisions implemented by the *Sharī'a* and RSL, Article 295 states that:

> If a master of a vessel took aboard a cargo of some merchants at some designated location, and subsequently at the same location or some other location for whatever necessary reason will be forced to reduce the load of the cargo aboard as a safety measure for the vessel, and will also command that in order to further lighten the load, sails, anchors, or some other equipment be taken off the vessel, and this is done before the cargo is completely stored aboard, and due to this some damage or destruction takes place, if it can be proved that such damage or destruction happened due to the negligence of the patron, he shall be liable for and must pay the damage.

Moreover, Article 187 of the COS asserts that in the case when the merchants load cargo more than it is agreed upon:

If, however, merchants or a single merchant who had engaged the vessel to ship a thousand quintals of cargo shall load aboard the vessel one thousand five hundred or one thousand two hundred quintals, or more or less, without informing the patron about this and without making a change in their agreement or without entering this matter into the register, and the witnesses had only heard one thousand quintals of cargo mentioned, and the vessel meets with some misfortune, or it is necessary to throw some of the cargo overboard, and the patron of the vessel is able to show and prove that the merchants loaded aboard the vessel more cargo than was contracted for and entered in the register, and that the vessel was forced to throw the cargo overboard or that it experienced other damage due to the sneaky and fraudulent loading of the cargo, such merchant or merchants shall be required to reimburse other merchants whose cargo was thrown overboard for the actual value of such cargo as well as other damages which the patron of the vessel suffered on their account.

6.4.2.3 THE DEGREE OF DANGER:

What is the degree of danger that entitles the master to jettison goods? In the Islamic law, the feasible danger enables the master to take any procedure to overboard goods in order to preserve the vessel; therefore, it is considered within the orbit of general average[43]. Because the master is the person who is liable for the safety of the vessel, he is entitled to take the required procedures to overboard goods whenever he thinks that is necessary, even if the merchants or shipper or even sailors disagree with him[44]. However, to be

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[43] Al-Dardīr, *al-Sharḥ al-Ṣaghīr*, vol. 4, p. 76; Ibn Rajab, *al-Qawāʿid*, p. 36; al-Nafrāwī, *op.cit.*, vol. 2, p. 63; Ibn Juzay, *al-Qawānīn al-Fiqhiyya*, (Libya: al-Dār al-ʿArabiyya lil Kutub) (1982), p. 337.

[44] Ibid.; al-Qarāfī, *al-Furūq*, vol. 4. p. 8.

in safe side, the master shall take the opinion of either merchants or sailors before commencing jettison[45].

The medieval legal collections include some provisions, requiring from the master to discuss the situation with merchants prior to jettison; yet this is not a condition to consider the loss as one that operated by the general average. According to Article 9 of the RSL:

> If the captain is deliberating about jettison, let him ask the passengers who have goods on board; and let them take a vote what is to be done... if there is an agreement for sharing in gain, after everything on board ship and the ship itself have been brought into contribution, let every man be liable for the loss which has occurred in proportion to his share of the gain.

Article 8 of the ROO allows the master to jettison, despite the objection of the merchants, it states:

> If a vessel be laden to sail from Bordeaux to Caen, or any other place, and it happens that a storm overtakes her at sea, so violent, that she cannot escape without casting some of the cargo overboard for lightening the vessel, and preserving the rest of the lading, as well as the vessel itself then the master ought to say, Gentlemen, We must throw part of the goods overboard; and, if there are no merchants to answer him, or if those that are there approve of what he says by their silence, then the master may do as he thinks fit; and if the merchants are not pleased with his throwing over any part of the merchandise, and forbid him, yet the master ought not to forbear casting out so many of the goods as he shall see to be for the common good and safety; he and the third part of his mariners making oath on the Holy Evangelists, when they arrive at their port of discharge, that he did it only for the preservation of the vessel, and the rest of the lading that remains yet in her.

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[45] As we discussed above, Shāfi'i and ḥanbali scholars refused the contribution in general average unless there is agreement at the time of danger.

Moreover, Article 99 of the COS is similar to what the Islamic law has confirmed, as it includes the procedures that should be followed prior to jettison. However, following these procedures is not required to consider the loss as one of the general average, it states:

> When a storm overtakes a vessel and its master is convinced that there is a possibility that the vessel may sink unless he disposes of some of the cargo aboard, he should explain this to the merchants and inform them in the presence of the navigator and all persons present on the deck in the following manner: "Sirs, merchants, if we do not lighten the load, we will find ourselves in danger and expose all on board, plus the cargo and other merchandise and possessions, to a total loss. If you, gentlemen merchants, consent that we reduce the load we have aboard, we will be able with the aid of God to save all the people aboard as well as most of the cargo. If, however, we do not throw some of the cargo overboard, we will find ourselves in danger of losing our lives and all our possessions."

The above provision is crucial for proof that is why Article 99 continues to maintain that:

> Under such circumstances the clerk of the vessel will be able to set in writing all agreements as if the vessel were moored. If, for some reason, the clerk could not set this in writing, the sailors can attest to all the agreements made and promises entered into between the patron and the merchants, because the clerk was unable to enter them into the ship's register. This is done in order that all agreements and promises made between the merchants and the master of the vessel are entered into without any deceit or fraud.

On the other hand, what if no merchants are on board the ship? The following article answers the question:

> If, however, it should happen that there are no merchants aboard the vessel, the patron under such circumstances will

act in the name of the merchants, and whatever action he pursues he should do so only after he reaches an understanding with the navigator, shareholders and the members of his crew. After he has reached such an understanding with those mentioned above and proceeds to toss cargo overboard, his action will be as binding as if all the merchants were aboard or as if all the cargo belonged to him personally.

The aforesaid procedures were mentioned in order to avoid unnecessary jettison and the objections of merchants, thus according to Article 283, the master is bound to follow the preceding procedures if he has time to do so; on the other hand, if there are no merchants aboard the vessel, the master may order the cargo jettisoned with the approval of the majority or all of the crew members, if he has time to ask their assent to this. If, however, a storm should overtake them suddenly, and the master ordered the cargo jettisoned without being able to get the assent of the persons mentioned above, this action will have the same validity as if the master had been able to get such assent from the crew or if the merchants were aboard, or if all the cargo belonged to the master personally; the cargo aboard his vessel can actually be considered as his property, as it was entrusted to his care. Yet, if a storm should overtake them and definitely endanger the vessel, not only shall the master jettison goods without discussing the matter with merchants but also the merchants are entitled to jettison without notifying the master.

6.4.3 PRIORITIES TO BE THROWN OVERBOARD IN THE JETTISON:

Al-Bahūti maintains[46] that when the vessel encounters imminent sinking, the passengers must overboard goods if they think that will save them, even if it means to overboard the entire goods and luggage; this is in order to avoid the serious harm by committing the light harm. It is forbidden to overboard the beasts as long as it is possible to lighten the ship by jettisoning luggage. However, in the event of necessity, it is permitted to overboard the beasts in order to save people, because the life of people is more important, under these circumstances, the preceding rule is not confined to free men only, but also slaves, if they think that by staying behind to supervise jettison, they are committing sin; this is in accordance with what the All-Mighty says in the noble *Qur'ān*[47]: "*make not your own hands contribute to (your) destruction.*"

However, if there are nothing aboard a ship but humans, scholars have unanimously agreed that it is prohibited, under the Islamic law, to overboard human, either man or woman, free man or slave, or even either Muslim or non-Muslim[48]. Nonetheless, it is stated that it is permitted, in rare occasion,

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[46] Al-Bahūti, *Kashf al-Qinā ʿ ʿAla Matn al-Iqnā ʿ*, (Beirut: Dar al-Fikr), 1982, vol. 3, p. 382; al-Futūhi (Ibn al-Najjār), *Maʿūnat Uli al-Nuha Sharḥ al-Muntaha (Muntaha al-Irādāt)*, (Beirut: Dār Khiḍr) (1996), vol. 5, p. 179.

[47] *Qur'ān* II: 195.

[48] Al-Dardīr, *al-Sharḥ al-Ṣaghīr*, vol. 4, p. 76; al-Nafrāwi, *op.cit.*, vol. 2, p. 63; *al-Mawsūʿa al-Fiqhiyya*, vol. 1, p. 229.

to jettison human when there is danger to the ship, and only human on board to choose by lot, yet this opinion was criticised[49].

Al-Dardīr has mentioned the things which take priority in jettison; he proposed that what should be thrown first is the heaviest stuff, like iron and lead, and the cheapest stuff or the biggest one even if it is light, such as straw, flax, cotton[50].

6.4.4 ESTABLISHING GENERAL AVERAGE:

6.4.4.1 REQUIREMENT TO PROOF:

If many merchants were on board the vessel at the time of a dangerous situation, the master shall instruct them about the necessary procedures he must take in order to avoid danger; if they agree they will contribute in the general average[51]. In contrast, if the danger occurs and the master sacrifices some goods when the merchants were absent, how such harm can be established that it is within the course of the general average? As for foodstuff, the master needs evidence to support his view. However, as for those stuff that were overboard, if they were for commercial transactions, according to one view, the master needs evidence to support his argument;

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[49] Al-Dardīr, *Ibid*, vol. 4, p. 179.

[50] *Ibid*, vol. 4, p. 76-77; *al-Mawsūʿa al-Fiqhiyya*, vol. 28, p. 307.

[51] Murād, A., *op.cit.*, pp. 61-63.

whilst the other view believes that the master does not need to prove what he has contended[52].

6.4.4.2 THE LEGAL BASIS OF THE DOCTRINE OF GENERAL AVERAGE:

Māliki scholars state that the parties interested in the maritime adventure are bound to contribute in general average on three occasions: (1) when jettison in order to save ships and goods, (2) loss and damage to goods owned by many merchants (as explained above), (3) ransom to pirates in order to free the vessel. The scholars have established such contribution on the idea of compulsory partnership between parties interested in the maritime adventure.

Mālik has maintained[53] that when a shipment is jettisoned, due to terror (*hawl, faza* ʿ), those whose goods are not jettisoned must share their goods with other shippers, and what have been jettisoned and remained from goods are to be shared by all of them, with its increase (*namā'*) and decrease (*naqṣ*), at the time of purchasing, without partiality (*muḥābāh*), because they save their goods with such act. This act is fair, because no one shall benefit alone from this situation, as they have all survived.

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[52] Al-Wansharīsi, *al-Miʿyār al-Muʿrib*, vol. 8, p. 309.
[53] Murād, A., *op.cit.*, pp. 62-3.

It seems that the jettison of some goods has created a partnership between the parties interested in the maritime adventure; this compulsory partnership was established due to exceptional circumstance, as the journey had encountered danger. Therefore, if the vessel is sunk or grounded, the cargo owners lose their goods on board and the merchants lose their property that they have invested. The master sacrifices some of the cargo in order to save the remaining property; accordingly, it is unacceptable to say that those who suffer jettison incur loss whilst those who do not suffer jettison get away with their property.

Certainly, in doing so, the master has benefited the shipowners and cargo-owners whose goods were saved; thus they should bear the consequences by contributing to the loss due to jettison. Mālik suggested[54] that it is obligatory for those whose goods were saved to share them with other shippers, and what jettisoned and remained from goods are to be shared by them all, with its increase (*namā'*) and decrease (*naqṣ*).

Consequently, the saved property is considered the benefit that the partners have gained, and loss is the property that they have jettisoned, that is why everyone who has benefited from such maritime adventure shall bear part of the so-called loss. It seems that Māliki scholars have based their opinion with regard to the loss of goods belonging to several merchants on

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[54] *Ibid.*

partnership (*sharikah*), as discussed above, when such loss is not attributed to the master; therefore, they share the loss and damage[55].

Mālik[56] gave a ruling on people charter vessel carrying foodstuff belonging to them; once they reach their destination, the first man who reach his house say I will take my foodstuff and then takes his foodstuff; afterward the ship has been declared sunk, Mālik said that the merchant is not liable for the subsequent consequence, either they agree or not, unless they weight and find shortage in weight, then he bears in proportion to his foodstuff.

Commentary on the preceding situation, Mohammad Ibn Rushd[57] distinguished between the situation when a concluded agreement among merchants stated that each of them would receive his goods at his designated destination and the situation when they agreed to receive their goods at one agreed port for discharge. Hence, when merchants charter the ship to take foodstuff to their houses, each of them, once he reaches his house (destination), is required to take his foodstuff, because he carries it with them (other merchants), if subsequently the foodstuff was in deficiency he shall bear such deficiency in proportion to his foodstuff, as he carries it with them in partnership; the same rule applies when the wheat that is kept in the bottom of the ship is damaged, unless such damage has occurred after he took his foodstuff, also the same rule is applied in the event of

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[55] *Ibid.* p. 65.
[56] Ibn Rushd, *al-Bayān wal Taḥsīl*, (2nd ed., 1988), vol. 9, p.77.
[57] *Ibid*, pp. 77-78.

grounding. On the other hand, if they carry their foodstuff to one agreed destination and the shipment is mixed up with each other or they mixed them up, none of them is allowed to take his shipment in transport without permission from the remaining merchants. This is because the shipment in the bottom of the ship might be damaged or will be damaged later; but if he took his foodstuff in transit with permission from the remaining merchants, he is immune from liability for the subsequent consequences.

Moreover, Mālik was asked about the case of a man (charterer) carrying his shipment of five hundreds ardeb (*erdab*) of wheat; at the next port a man asked him if he had space to carry one hundred ardeb more of wheat, and he accepted the offer and put them on top of his (charterer) shipment. However, later, leakage caused damage to fifty erdab of wheat that was kept in the bottom of the ship; the damage did not reach the shipment of the second merchant, as they were kept on top of the charterer shipment. Mālik has ruled that they are partners; they have carried shipment as partners and mixed them up[58]. And they are partners in proportion to their shipment[59].

6.4.5 THE SETTLEMENT OF THE GENERAL AVERAGE:

Due to māliki judgement, scholars have established the legal basis of the general average on the idea of partnership or company between different parties interested in the maritime adventure. The settlement of the general

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[58] *Ibid*, p. 85.
[59] Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. 5, p. 454.

average is simply liquidation for such company. The settlement should take place at the port of discharge, otherwise at the designated destination. The settlement is concluded between the master and the parties interested in the maritime adventure. In the event of dispute, they should settle it in court. In order to conclude settlement, losses should be evaluated; thus, it can be considered as general average and the saved property is used to solve such losses. The first group is known as creditor group, whilst the other group is known as debtor group.

6.4.5.1 CREDITOR GROUP:

This group consists of the entire loss that the parties, interested in the maritime adventure, have incurred; thus it should be allocated to them. Scholars have confirmed that there should be contribution for losses due to jettison to save maritime adventure. However, they disagree over other elements. The following paragraphs will elaborate more on these elements:

6.4.5.1.1 THE SACRIFICES OF GOODS:

Māliki jurists hold the view that losses, as a consequence of public interest, shall be borne by parties interested in the maritime adventure. Yet, scholars have disagreed about the estimate of these goods. Mālik has adopted the opinion that the goods should be evaluated at the time of loading (*waqt al-shaḥn*). Despite that there are various opinions about the estimation of the

sacrificed goods, whether according to its value at the port of loading, or port of discharge, or at the time of jettison[60].

Article 96 of the COS states that: "The value of the cargo thrown overboard in stormy weather or due to pursuit by enemy vessels will be assessed proportionally to the value of all the cargo aboard." The sacrificed goods should be valued according to their value at either port of loading or port of discharge. Article 97 gives detail of how such estimation should be done, it states:

> When any cargo is tossed overboard ... it should be evaluated in the following manner: If it was thrown overboard before the vessel covered half the distance to its destination, it should be valued at the price at the point of departure. If it was disposed of after half the distance was traversed, the cargo tossed overboard as well as the cargo saved should be evaluated according to its value at the port of destination.

6.4.5.1.2 LOSS TO OTHER PROPERTY:

Not only property for commercial transactions purpose might be saved but also personal belongings and stuff for accommodation ... etc. Are these properties included in the estimation of losses that considered under the general average? Only the saved properties for the commercial transactions purpose are included in contribution and evaluated for the purpose of estimating the general average[61]. On the other hand, Ḥanafi scholars hold

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[60] Ibn Rushd, *al-Bayān wal Taḥṣīl*, *op.cit.*, vol. 9, p. 85-87; Murād, A., *op.cit.*, pp. 61, 63-5.
[61] Saḥnūn, *op.cit.*, vol. 4, p. 77; al-Wansharīsl, *op.cit.*, vol. 8, p. 311; Murād, A., *op.cit.*, pp. 66-7.

the view that the vessel and what it conveys should be included in evaluation, whether such properties are for commercial purpose or personal purpose[62].

According to the COS, any valuable property shall be included in contribution to estimate the general average, on the condition that their owner should declare their value, Article 257 states:

> If due to some unfortunate accident it shall be necessary to throw cargo overboard, or the vessel will be wrecked or will founder in the shoals, the crates, bales, chests, and other containers in which the valuables had been secreted shall be evaluated for damages only in the amount they were valued at the time of shipment.

6.4.5.1.3 SACRIFICS OF VESSEL:

When jettison occurs the vessel might incur damage, this damage may take three various types: (1) damage to vessel, (2) loss of equipments, (3) exceptional stoppage. The following is a detailed discussion of the three types:

6.4.5.1.3.1 DAMAGE TO VESSEL:

As aforementioned[63], Māliki scholars have stated that the master is liable for the collision when it occurs due to manoeuvre to avoid sinking or night navigation without light. Consequently, the master shall bear such loss.

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[62] Al-Qarafi, *op.cit.*, vol. 4, p. 9.
[63] See above, when we discussed collision due to the fault.

6.4.5.1.3.2 LOSS OF EQUIPMENTS:

If the master tossed overboard some property and it was included in this jettison some anchors, mooring cables, lines, boats and other equipments, these properties are included in general average[64].

6.4.5.1.3.3 EXTRAODENARY EXPENDETURE:

After such casualty, the ship may head towards near port to carry out some maintenance for the damage incurred; sometimes such maintenance may be required in order to fix any damage to the vessel; the master should incur expenses for this purpose, whether or not these expenses are considered in general average? If the ship encounters the danger of facing an enemy or heaving sea, the passengers may ask the master to head to safe place, until such danger is cleared away; at the port where the ship is heading, merchants may discharge their goods and anyone who does so shall pay full freight[65]. Because the merchants are not liable to pay extra freight due to exceptional stoppage as a result of force majeure, it seems that the shipowner should bear any consequence due to exceptional stoppage, thus it is not included in general average.

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[64] Murād, A., *op.cit.*, pp. 61-26.
[65] Abi al-Qāsim Ibn Sulaymān, *Kitāb al-Munaẓẓim lil Ḥukkām*, vol. 2, p. 7.

6.4.5.1.4 THE SITUATION UNDER THE MEDIEVAL LEGAL COLLECTIONS:

These collections adopt provisions regarding the loss of equipments, the preceding loss are included in general average. Hence article 9 of the ROO states:

> If it should happen, that by reason of much foul weather the master is like to be constrained to cut his masts, he ought first to call the merchants, if there be any aboard the ship, and such as have goods and merchandise in the vessel, and to consult them, saying, Sirs, it is requisite to cut down the mast to save the ship and lading, it being in this case my duty. And frequently they also cut their mooring cables, leaving behind them their cables and anchors to save the ship and her lading; all which things are reckoned and computed livre by livre, as the goods are that were cast overboard.

Article 284 of the COS maintains that the loss of equipments due to force majeure is included in general average, whilst the master bears the consequences if it was due to deficiency in mooring cables, it states:

> If it should happen that a vessel should lose some equipment, such as anchors, lines, boats, or any other equipment, all this shall be proportionally evaluated, because this is not a matter of simply throwing of cargo or equipment overboard, and therefore the matter cannot be treated in the same manner, for such a situation more closely resembles a shipwreck than a mere throwing of cargo overboard. In a typical situation when the cargo must be thrown overboard, a loss of a boat tied aboard the vessel or tied to its gunwales, due to the break of its lines or lack of sufficient ropes to tie it securely, would be the patron's responsibility, as he is to see that proper ropes are used to secure such boat. Similarly, in a case of an ordinary necessity of throwing cargo overboard due to the loss of anchors because of weak anchor chains or lack of enough anchor chains, the loss would have to be assumed by the vessel, and no merchant or any of his cargo left aboard the vessel would be under such circumstances assessed for the damage that had taken place.

Article 43 of the RSL maintains:

> If a ship is caught in a storm and makes jettison of its cargo, and breaks its sailyards and mast and tillers and anchors and rudders, let all these come into contribution together with the value of the ship and of the goods which are saved.

Article 44 adds:

> A ship has a cargo and in a gale the mast is jettisoned or the tillers broken or one of the rudders lost. If it happens that the cargo gets wet from the gale there is every necessity that these should come to contribution.

6.4.5.2 DEBTOR GROUP:

When the master throws overboard some goods or surrenders some of it to an enemy in order to free the vessel, he is doing so in order to save the vessel and what it conveys, either people or property. When such incident occurs, which elements should be counted in order to cover the loss?

Ḥanafi jurists claim[66] that everything on board the ship shall be counted to cover general average, either personal belongings, slaves and other property not for commercial purpose or even property for commercial purpose, because the sacrificed property saved everything; they have based their opinion on the fact that the ship should reach its destination with what it carries, and grounding occurs due to shipment. Consequently, saving the

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[66] Al-Qarafi, *op.cit.*, vol. 4, p. 9-10.

maritime adventure has established a company between the parties interested in the maritime adventure, but has not eliminated the danger.

There is a controversy among scholars about the nature of the act of master, what should be contributed in general average? The first opinion has maintained that sacrificing some shipment has eliminated the danger; accordingly, everything that have contributed in causing such danger should contribute in the consequences; whilst the other opinion has claimed that the act of the master is considered as rescuing the saved property from maritime adventure, thus damage should be allocated to every saved property.

The elements that should be counted in general average should be discussed below:

6.4.5.2.1 SAVED GOODS:

Māliki scholars hold the view that saved goods should contribute in assessing damage due to tossed goods overboard. The evaluation should be either according to the value of goods at the time of purchase or at the time of accident or at the time of destination; it is noteworthy that one method should be followed to evaluate the saved goods and sacrificed goods[67].

The medieval legal collections are incorporated provisions similar to that recognised by the *Sharī'a*, that the saved goods should be brought into

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[67] Ibn Rushd, *al-Bayān wal Taḥṣīl*, *op.cit.*, vol. 9, p. 85-87; Murād, A., *op.cit.*, pp. 61, 63-5.

contribution; thus Article 9 of the RSL[68] states that: "Let there be brought into contribution the goods; …" as for the value of goods, Article 8 of the ROO states: "And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the just value of the other goods that arrive in safety." Nonetheless, Article 97 of the COS adopted an intermediate method for the evaluation of goods[69]

6.4.5.2.2 OTHER SAVED PROPERTY:

It refers to the property and personal belongings as well as valuable things that have been saved due to jettison. Māliki jurists are concerned with the purpose of property. So, only the property intended for trade should come into contribution, if it is for personal purpose, it should not come into contribution[70]. Consequently, money intended for trade should come into contribution, but if it is for personal purpose it should not come into contribution. In addition, silver, gold and jewellery were used for commercial transactions; therefore, they should come into contribution if they were intended only for trade[71].

Ḥanafi scholars hold the view that the vessel and what it carries on board, i.e. property not for trade, goods, slaves and other property intended for

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[68] See also Article 35 of the RSL.
[69] To read provision 97 of COS see p. 271.
[70] Al-Wansharīsi, *op.cit.*, vol. 8, p. 311.
[71] Al-Qarafi, *op.cit.*, vol. 4, pp. 9-10.

trade, should be brought into contribution, since the sacrificed property saved everything on board[72].

Hence, article 35 of the ROO adopts similar principle that is in parallel with what is recognised under the ḥanafi scholars, meaning that everything on board should contribute in general average.

The RSL provides three provisions: 30, 31 and 41, some illustration about the saved silver, gold and jewellery. The owner of these items is simply required to contribute in one fifth of them; it seems that it a reward for saving but not as a contribution.

According to Article 132 of the COS, personal belonging of a sailor is not assessed for damages resulting from cargo being thrown overboard in case of necessity. However, if "due to some unfortunate accident, it is necessary to dump some cargo overboard, such a sailor will be required to share in the damages resulting in proportion to the value of his free freight merchandise and the value of the cargo dumped overboard." On the other hand, the valuable things should not come into contribution[73].

It seems that the provisions that were adopted in the RSL and the COS are akin to what is confirmed by the māliki scholars; actually the Māliki jurisprudence were applied in eastern part of the Islamic world, whilst the

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[72] Ibid.
[73] See Article 257.

ROO are similar to other Islamic schools, where it was applied in the eastern part of the Islamic world. This conclusion emphasises that the RSL and the COS were inspired by the Islamic principles that were applied in southern Italy and Spain, while the ROO were inspired by the Islamic principles that were applied in Syria prior and throughout the Crusades.

6.4.5.2.3 THE VESSEL:

Ḥanafi scholars hold the view that the ship shall come into contribution, whilst māliki scholars have several views; the first being that the ship does not come into contribution[74]. The second view is that if the jettison is due to an imminent danger to the vessel that it may hit seabed, the ship shall come into contribution[75], while Saḥnūn goes beyond the foregoing view when he states that the vessel shall come into contribution[76].

Articles 95, 96 and 98 of the COS state that the master should contribute to the equivalent of the half price of the vessel; furthermore, article 284 states that the vessel should contribute to the equivalent of its two third of its price.

Article 8 of the ROO leaves the matter to the master; he has the choice regarding contribution, that is to say either to contribute or not. Whilst

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[74] Al-Wansharīsi, *op.cit.*, vol. 8, p. 311.
[75] Al-Qarāfi, *op.cit.*, vol. 4, p. 9.
[76] Saḥnūn, *op.cit.*, vol. 4, p. 77; also see al-Qarāfi, *Ibid.*

Article 35 of the RSL states that the vessel should come into contribution, it states: "If a ship makes jettison of its mast, whether it breaks of its own accord or is cut, let all the sailors and the merchants and the goods and the ship so far as saved, come into contribution."

6.4.5.2.4 FREIGHT (AL-UJRA):

As it is elaborated above, Māliki scholars believe that freight is payable according to the contract, if it is a contract of affreightment, freight is payable in advance; consequently, he receives the freight for the sacrificed and saved property. However, for the voyage charterparty[77], shipowner is entitled to freight when goods arrive at designated destination. When the ship arrives at its designated destination with deficiency of shipment due to jettison, the master is entitled only to freight for the saved goods, but not for the goods that were tossed overboard[78].

There are some similarities between the foregoing principles of the *Sharī'a* and what is mentioned in the COS. Article 98 of the COS maintains that the freight should come into contribution only when it is paid either in advance or when he claims it in full despite of jettison. It states:

> If the patron of the vessel demands that lading charges be paid on the cargo salvaged as well as on the cargo tossed

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[77] Sea chapter three.
[78] Ibn Rushd, *al-Bayān wal Taḥṣīl*, op.cit., vol. 9, p. 93-4; Murād, A., *op.cit.*, pp. 61, 65-66, 68.

overboard, he must be paid as if all of the cargo had been saved; however, under such conditions the patron will be required to share the damage in the amount that he received for carrying the cargo in the same degree as the cargo salvaged.

What is the reason? Because the patron received payment for the cargo which was thrown overboard as well as for the cargo which was saved. It is, therefore, just that in accepting lading charges for cargo saved and lost, he should be obligated to share in the damages to the whole amount of these lading charges.

Further, if the patron of a vessel demands and receives payment for carrying only that part of the cargo which has been saved, he will not be required to share in the damages to the amount he had received for carrying such cargo, and the reason for this is that he has been damaged enough, because he has lost the amount he would have received for the cargo which was thrown overboard.

Article 284 of the COS adopts the same principle that is recognised under the *Sharīʿa*, that the master can claim freight only when the goods arrive safely at destination.

6.4.5.2.5 PEOPLE ON BOARD:

According to māliki opinion, if jettison occurs for the purpose of saving human life, those who survive, either master or crew or passengers are not required to pay compensation for any loss due to jettison[79]. Whilst the Ḥanafis believe that compensation is payable according to their number, that is if the purpose was to save people on board[80].

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[79] Al-Qarāfi, *op.cit.*, vol. 4, p. 10.

[80] *Al-Mawsūʿa al-Fiqhiyya*, vol. 28, p. 306.

It seems that article 35 of the RSL prescribes liability on people on board to contribute in general average, as it maintains: If a ship makes jettison of its mast, whether it breaks of its own accord or is cut, let all the sailors and the merchants and the goods and the ship so far as saved come into contribution.

7. LIMITATION OF LIABILITY:

7.1 GENESIS:

7.1.1 WHAT IS THE DOCTRINE?

In the world of commerce, breach of contract or a tortuous act is likely to result in litigation for compensation against the wrongdoer. The level of compensation due may be easy or difficult to assess but once assessed it must be reimbursed in full – the principle of *restitutio in integrum.* In particular circumstances the right to full compensation is limited, either due to the express terms of the contract ruling, transaction or entitlement to a full recovery limited by law. Contractually agreed limits will be found, for instance, in ship repair contracts, where a right to claim damages may be confined to the cost of repairing physical damage – claims for consequential loss being specifically eliminated. Examples of the second statutory type of exclusion may be found in the area of carriage of goods and passengers by land, air and sea.

That is to say that when a vessel collides with and damages another ship and/or causes loss of life or personal injury to passengers or other personnel, the owner of the negligent vessel need not be liable for full compensation. Usually, he may limit his liability according to the size of his vessel.

7.1.2 SYSTEMS OF LIMITATION:

There have been two main systems of limitation in use internationally. The older system established the limit of liability according to the value of the vessel. The trouble with this system was that it favoured the owners of old, poorly maintained ships in the sense that if the ship sank after a collision the limit would be next to nothing[1]. The modern system is based on the British nineteenth-century legislation which used the tonnage of a vessel to measure her limit[2].

7.1.3 RATIONALIZATION:

The limitation of liability doctrine is justified on several grounds, including that of national defence[3]. Note believes that the economic rationale is more persuasive, as the shipowners accompany their ships on longer voyages[4]. Moreover, it is known that sea carriers sustained greater financial risks than land carriers[5]. Hugo Grotius defended it by pleading public policy, and the

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[1] Gaskell, N. J. J., Debattista C., & Swatton R. J., *Chorley & Giles' Shipping Law*, (8th edn., 1987).

[2] The Titanic limitation proceedings in the USA demonstrate the differences in the systems. The ship had a pre-accident value of about £ 1,500,000. Under the British tonnage system her limit would have been about US $ 3,750,000. After her loss her then US limit was US $ 91,805 (made up of, e.g. salved lifeboats and advance passage money). The total personal claims were US $ 22,000,000: see *Oceanic Steam Navigation Co. v. Mellor* 209 F. 501 (2 Cir., 1913), 233 US 718 (1914).

[3] Purdy, The Recent Amendment to the Maritime Limitation of Liability Statutes, 5 *Brooklyn Law Review* (1935), 42 at 43.

[4] Note, Limitation of the Liability of Shipowners, 35 *Columbia Law Review* (1935), 246, 247 & n. 1.

[5] Poor, A Shipowner's Right to Limit in Cases of Personal Contracts, 31 *Yale Law Journal* (1922), 505, 505.

same view was expressed by Dr Lushington[6]. Fundamentally, Grotius proves the principle as being consistent with natural justice and necessary for the encouragement of shipping[7]. In a more recent case *the Bramley Moore*[8], Lord Denning MR admitted that the shipowner's right to limit his liability "is not a matter of justice ... [but has] its justification in convenience."

7.1.4 CONTROVERSY AND EMERGENCE OF THE DOCTRINE:

It is argued that the doctrine of limitation of liability seems to have first emerged in Italy[9] between the fall of the Western Roman Empire[10] and the Crusades[11], and then to have spread to Spain and France[12]. The earliest evidence of the shipowner's entitlement to limit his liability is found in the Tables of Amalfi, a commercial code passed for the "free and trading republic of Amalphia [Italy]" in about the eleventh century[13]. The controversy will be dealt with in detail below during the discussion of limitation of liability under the *Sharī ʿa*.

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[6] *The Amalia* (1863) Br. & Lush. 151; E.R. 323.
[7] McGuffie, K.C., *Marsden's the Law of Collisions at Sea*, (1961), 130. [hereinafter Marsden].
[8] *The Bramley Moore: Alexandra Towing Co. v. Millet* [1964] P. 200 at 200.
[9] *The Rebecca*, 20 F. Cas. 373, 378 (D. Me. 1831) (No. 11,619).
[10] Marsden, *op.cit*, at p. 129.
[11] Sprague, G., "Limitation of Ship Owner's Liability," 12 *New York University Law Quarterly Review* (1935), 568 at 568.
[12] Note, *op.cit*, at p. 247.
[13] Sprague, *op.cit*, at pp. 568-9.

The commercial revolution of the sixteenth and seventeenth centuries saw the acceptance and spread of the benefit of such doctrine to almost the entire of the continental maritime jurisprudences[14]. The first codification that incorporates the doctrine of limitation of liability was that of Louis XIV compiled in 1681, known as The Marine Ordinance of Louis XIV[15]. It provided "Title Fourth, of the Owners of Ships,"

"II. The owners of ships shall be liable for the deeds of the master; but shall be discharged of abandoning their ship and freight." The Ordinance ultimately became a part of the maritime law of several European and Latin American countries[16].

7.1.5 THE POSITION IN ENGLAND[17]:

In England, the limitation of liability depends wholly on statute[18]. Generally, English law traces its origin from the Rules of Oleron[19] which contain no indication of limitation of liability of shipowner. Until 1733 the liability of shipowner for damages by collision was unlimited. In that year, a law (Responsibility of Shipowners) was passed limiting the liability for loss of cargo and theft of master or crew to the value of the vessel and freight. In fact, this law was passed as a result of the decision in *Boucher v.*

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[14] Purdy, *op.cit*, at p. 42; Owen, *supra*, at p. 764; Marsden, *op.cit*, at p. 130.
[15] Donovan, J., "The Origins and Development of Limitation of Shipowners' Liability," 53 *Tulane Law Review* (1979), 999, 1003; *Chorley Giles's Shipping Law*, *op.cit*, at p. 394.
[16] *Ibid*, at p. 1004.
[17] For great discussion about the development of the so-called doctrine in UK see, Griggs, P., "Limitation of Liability for Maritime Claims: the Search for International Uniformity," *LMCLQ* (1997) 369 *et seq*; Sprague, *op.cit*, 568 *et seq*.
[18] Marsden, *op.cit*, chapter 7.
[19] Gilmore & Black, *op.cit*, at p. 7.

Lawson[20] where certain English shipowners were found to be personally accountable for the value of a cargo of bullion which had been stolen by the master after it had been loaded in Portugal. This decision was strongly criticised by shipowners, who petitioned Parliament in the following terms: "unless some provision be made for their relief, trade and navigation will be greatly discouraged, since owners of ships find themselves … exposed to ruin"[21].

Rights of limitation of liability, like other fields of maritime law, were consolidated in the UK in the most essential shipping statute of the 19th century, the Merchant Shipping Act 1894[22].

7.2 THE ORIGIN OF THE DOCTRINE OF SHIPOWNER'S LIMITATION OF LIABILITY:

The first application of the concept of limitation of liability to maritime activity is traced back to the fourteenth century in the Mediterranean[23]. Originally, neither Roman nor Common law have dealt with limitation of

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[20] Cas. temp. Hardw. 85. cited in Marsden, *op.cit*, at p. 131.
[21] For full view of shipowners see P Griggs, *op.cit*, 370.
[22] See section 503 of the so-called Act.
[23] Kierr, R.H., "The Effect of Direct Action Statutes on P & I Insurance on Various Other Insurance of Maritime Liabilities," (1968) 43 *Tulane Law Review*, 639.

liability. The following paragraphs explore the origin of the doctrine of limitation of liability.

7.2.1 DOCTRINE OF NOXAE DEDITIO:

Despite the controversy that the origin of the doctrine of limitation of shipowner's liability is traced back to Italy, there is some uncertainty surrounding its origin[24]. However, there were some attempts to bring forward an original theory that the doctrine was derived from the Roman legal doctrine of *noxae deditio*, under which the owner may exonerate himself from liability for wrongful acts of a master appointed by himself on surrendering his interest in the ship and the freight which she had earned[25]. However, Marsden rejected such theory as the origin of the doctrine[26]. Moreover, there is little reason to assume that a Roman maritime code, if there exists one[27], contained any provision for shipowner's limitation of liability[28].

7.2.2 THE CONTRACT OF COMMENDA:

The contract of commenda or joint adventure of the shipowners and merchants, corresponding in some respects to the *societé en commandite*, or partnership with limited liability, is likely to be the origin of the doctrine of

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[24] Donovan, *op.cit.*, at p. 1000.
[25] Holmes, O.W., *The Common Law*, (1881) (Little, Brown & Company: Boston), 30; Kierr, R.H., *op.cit.*, at p. 639.
[26] Marsden, *op.cit.*, at p. 130.
[27] Gilmore & Black, *op.cit*, at p. 3-5.
[28] Donovan, *op.cit*, at p. 1000.

shipowner's limited liability. The contract of commenda first appeared before the twelfth century[29], when it was a commercial instrument whereby a person would invest his capital with a merchant or a mariner and receive a rated proportion of the profit in return [30]. The contract has been described as "a sort of qualified partnership" in which the person who advanced the goods or finances, though interested in the trading contracts entered into by the merchant or mariner in control of his property, was not in person liable for those contracts[31]. Furthermore, the contract of commenda greatly favoured instrument is indicated by the comprehensive rules prescribed for its use in the COS[32]. In reality, the COS became the common law of all commercial powers of Europe[33].

It is assumed that the contract of commenda is the implementation of the contract of *muḍāraba* that is recognised under the Islamic law. Many authors hinted that the contract of *muḍāraba* or *qirād* is the origin of the commenda contract[34]. The contract of *muḍāraba* has been extensively discussed by Muslim scholars, and is highlighted in the next pages in order to know more about the origin of the doctrine of shipowner's limitation of liability.

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[29] *Ibid*, at p. 1001.
[30] Kier, R.H., *op.cit*., at p.638.
[31] *The Rebecca*, *op.cit*, at p. 378.
[32] Marsden, *op.cit*, at p. 129; Sprague, *op.cit*, at p. 569.
[33] Sprague, *Ibid*.
[34] Udovitch, A, "At the Origins of the Western Commenda: Islam, Israel, Byzantium?" (1962) 37 *Speculum*, 198-207; Pryor, J., "The Origins of the Commenda Contract," (1977) 52 *Speculum*, 5-37.

7.3 THE FUNDAMENTAL ROLE OF THE MASTER:

The role of the master was increased from the first period of the medieval. Due to his new role, he was responsible for his contractual acts. However, because of the great authorities of the master that he enjoyed, he was liable for any damages caused to the injured parties and creditors for his acts and the injured parties were entitled to gain compensation from property on board the vessel and the vessel itself. It was for this reason that the doctrine of the shipowner's limited liability emerged[35].

Muslim jurists consider the master as the merchant who controls commercial and navigational management of the vessel. Jurists deem the master as common carrier (*ajīr mushtarak*) and, thus, liable personally for the consequences of his acts and contractual responsibilities. Therefore, the shipowner shall not be liable for such acts.

Muslim scholars did not give attention to the formal procedures. Hence, the promulgating means were inadequate to inform everybody, and for this reason, the property in possession of the master was presumed to belong to him. When his acts lead to the cause of injury to others, the injured parties and creditors were entitled to claim compensation from the property he possesses besides the vessel. If these were not sufficient they were not entitled to claim anything more from the shipowners.

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[35] Rajab, M.M., *op.cit.*, p. 255.

Whatever be the position of the master, he is responsible to return the vessel to the owner upon the expiry of the contract. He is also liable for any damages caused to vessel due to his fault rather than to force majeure.

Due to the new role of the master the doctrine emerged. The agent-manager (*muḍārib*) receives the vessel from its owner according to the contract of *commenda*.

Sharīʿa explored many matters concerned with liability from using the vessel according to the contract of commenda. In fact, the COS states clearly that the master is considered as an agent-manager (*muḍārib*). Accordingly, Article 295 indicates the liability of the master for damage due to his fault, and provides that:

> "If the patron was without any means and was unable to pay the merchants for the damage suffered, it shall be proper, if he can be apprehended, to turn him over to the legal authorities, as would have been done in a case when the cargo had been specifically entrusted to his care, for every patron of a vessel must be treated and considered similarly to a party who had assumed control over all matters that occur in the relationship between the merchants and the owners of the vessel, …"

The role of the contract of *commenda* was important in the field of maritime law throughout the medieval era. However, it should be borne in mind that the contract of marine insurance was not known at that time, as this contract

permits those who have interest in the adventure to distribute the loss amongst them.

7.4 THE UNDERLYING PRINCIPLES OF CONTRACT OF COMMENDA UNDER THE ISLAMIC LAW (ʿAQD AL-MUḌĀRABA):

7.4.1 MUḌĀRABA OR MUQĀRAḌA:

Muslim jurists name this type of contract as *muḍāraba*. This term has roots in the noble *Qur'ān* where Allah the almighty says[36]: "*others travelling through the land, seeking of Allah's bounty.*" It is called *muḍāraba* because *al-muḍārib* (agent-manager) needs to travel. "*ḍarb*" is to travel, and travel is for the seeking of many purposes, such as education, trade, health and tourism. It is also called *muqāraḍa*, which means cutting or separation, as the owner separates a portion of his capital and gives it to *al-muqāriḍ* to invest it and give him back a portion of profit. It may also mean equality as the owner and the one who takes charge of this contract (*muḍārib*) shares the profit[37].

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[36] *Qur'ān* 73:20.

[37] Al-Nawawi, *op.cit.*, vol. 12, p. 139-40; al-Zuḥayli, *op.cit.*, vol. 4, p. 836. for more details about the differences between the so-called terms see, al-Māwardi, A., *Al-Muḍāraba*, (Dār al-Wafā'a: Cairo) (1989), pp. 117-9.

Muslim scholars discuss the subject of *muḍāraba* in various and detailed ways and aspects. However, the research will focus on certain matters related to the area of limitation of liability. These matters are as follows:

The legality of *muḍāraba*.

The definition of *muḍāraba*.

Rights and duties of parties.

The liability of parties.

7.4.2 THE LEGALITY & JUSTIFICATION OF MUḌĀRABA:

7.4.2.1 IN GENERAL:

Scholars agree that the legality of the contract of commenda[38] is based on principles derived from the noble *Qur'ān* and the *Sunna*. Generally speaking, the nature of any contract is that it is legal. This is derived from the general meaning of the verses of *Qur'ān*, which are mentioned below. In any contract, people seek welfare and increase profit. The Prophet (ppbuh) said that people should get benefit from each other, and in contract of commenda, both parties should gain mutual benefits.

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[38] Al-Nawawi, *op.cit.*, vol. 12, p. 149.

7.4.2.2 IN QUR'ĀN:

In the *Qur'ān*, Allah the almighty says[39]: "others travelling through the land, seeking of Allah's bounty." Furthermore in another instance, Allah says: "And when the Prayer is finished, then may ye disperse through the land, and seek of the Bounty of Allah.[40]" In addition, "It is no crime in you if ye seek of the bounty of your Lord"[41]. Despite their general meaning, the preceding verses permit *muḍāraba* and encourage trade. The implication is that travelling is a means for seeking advantages.

7.4.2.3 IN SUNNA:

There are several traditions of the prophet Muhammad (ppbuh) which affirm the legality of the contract of commenda. The Prophet (ppbuh) invested the capital of Khadīja (who later became his first wife) according to contract of commenda[42]. Therefore, when he narrated such incidence it was to affirm such transaction. Ibn ʿAbbās narrated that when Alʿabbās Ibn ʿAbdilmuṭṭalib surrendered his capital for *muḍāraba*, he laid down conditions that his capital not to be carried in sea or valley, and not to be transacted in animate (*thāt kabd raṭiba*); and if the *muḍārib* breaches any of

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[39] *Qur'ān* 73:20.
[40] *Qur'ān* 62:10.
[41] *Qur'ān* 2:198.
[42] Al-Māwardi, *op.cit.*, p. 121.

these provisions, he shall be liable for such breach. Al'abbas mentioned these conditions to the Prophet (ppbuh), who permitted them [43].

7.4.2.4 IN CONSENSUS (IJMĀ'):

According to the companions of the prophet (ppbuh), commendaship was permitted and was transacted. Therefore, there is a consensus for the allowance of *muḍāraba*. However, there is an argument affirmed by the following examples: Two of Caliph Omar's sons were in military mission in Iraq. Upon their return, they were given a capital and were told to invest it and return it back to treasury (*bayt al-māl*). They were also told to separate the profit from the capital and share it. Upon their arrival, Omar asked them to return the capital and the profit. Subsequently, it was suggested that such transaction be considered as contract of commenda, and that the capital and half of the profit and the other half be shared[44]. Furthermore, the Caliph 'Ali Ibn Abi Ṭālib said in this respect: "The loss to be borne by the owner and the profit is to be shared in accordance with the concluded contract. In addition, the Caliph Omar Ibn al-Khaṭṭāb gave the property of orphan (*yatīm*) for investment[45].

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[43] Al-Zuḥayli, *op.cit.*, vol. 4, p. 837. For more evidences see, al-Nawawi, vol. 12, pp. 149-151.
[44] Al-Nawawi, *op.cit.*, vol. 15, p. 138.
[45] Al-Salmi, S., *Sharikat al-Muḍāraba fil Fiqh al-Islāmi*,(Umm al-Qura) (1997), 47.

7.4.2.5 JUSTIFICATION FOR MUḌĀRABA:

This contract was known during the pre-Islamic period (*jāhiliyya*) and Islam affirmed it because it is beneficial to people, and generally, it is part of the principles of Islam to bring benefits for the community, so people live in welfare. *Muḍāraba* is a contract, as we shall see below, which brings essential advantages to people. Therefore, it is within the framework of the general principles of *Sharī ʿa*; which is the support of any action that brings good to the community. Consequently, if someone has capital and does not know how to invest it, he shall surrender it to another person, who might be out of work, but who is capable of managing this capital and invest it. Hence, this mutual benefit involves both parties when they share the profit according to the terms of the contract. Contracts are legalised under the Islamic law for the benefit of people and eliminate necessities[46].

7.4.3 THE DEFINITION OF MUḌĀRABA:

Udovitch[47] defines commenda as "an arrangement whereby an investor or group of investors entrusts an agent-manager with a capital or merchandise, for trading, and then for return to the investor(s) the principal and share of the profits that has been previously agreed upon. The remaining share of the profits goes to the agent as a reward for his labour. Further, the agent is in no way liable for any loss resulting from the exigencies of sea-travel or

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[46] Al-Zuḥayli, *op.cit.*, vol. 4, p. 839.
[47] Udovitch, A., *op.cit.*, at p. 198.

from an unsuccessful business venture. This is borne exclusively by the investor(s). The agent loses only his time and efforts." It appears from the foregoing definition that it is the core of the doctrine of *muḍāraba* contract. Such definition is not excluded from the meaning of *muḍāraba* recognised under the Islamic law.

Muḍāraba is surrendering capital to *muḍārib* in order to transact such capital in market. The profit is to be shared between them according to the terms and conditions of the contract. However, any loss during the course of the performance of such contract, shall be borne by the owner of capital solely; whilst the agent-manager loses only his efforts[48]. While Ḥanafi jurists see such contract as a contract of company in capital on the part of owner and work on the part of agent-manager (*muḍārib*)[49]; Māliki jurists define *muḍāraba* as an agency for investment in delivered property for a portion of its profit even if it is known[50]. Shāfiʿi jurists define the contract as an instrument that includes an agency whereby the owner pays the other party property for investment and the profit is to be shared between them[51]. Ḥanbli scholars define *muḍāraba* as the sharing without capital; that is to say, a person provides capital to another for investment, and the profit is to be shared between them according to the terms and conditions of the

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[48] *Ibid.* at p. 836-7; al-Nawawi, *op.cit.*, vol. 12, p. 148.

[49] *Al-Muwsūʿa al-Fiqhiyya*, op.cit., vol. 38, p. 36.

[50] Al-Azhari, Ṣ, *Jawāhir al-Iklīl*, (Dār al-Maʿrifa: Beirut) (1986) vol. 2, p. 171.

[51] Al-Ramli, *Nihāyat al-Muḥtāj ila Sharḥ al-Minhāj*, (Maktabat al-Ḥalabi: Cairo) (1967), vol. 5, p. 220.

contract[52]. In fact, the Ḥanbali jurists consider the commendaship as a company. Hence, one party provides capital to the other party for investment in common portion of profit.

To sum up, Shāfiʿi and Māliki jurists considered the commendaship as an agency. They may not be accurate in their definitions according to the reasons mentioned below. Moreover, when Ḥanafi and Ḥanbali defined *muḍāraba* as a company, they were in conflict with some principles of the contract of company, as illustrated below. Consequently, *muḍāraba* is a contract of sharing a profit, with the aim of reaching the agreement that one party shall provide the capital and the other shall contribute with his effort.

7.4.4 RIGHTS AND DUTIES OF PARTIES:

Like any contracts, the parties of the contract of commenda are free to set their provisions according to their will provided that such provisions be within the framework of the purpose of contract of commenda. As the contract of commenda has its own purpose which is different from some other contracts as has been and will be explained.

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[52] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 134.

7.4.4.1 THE RIGHTS OF THE OWNER:

The owner is the party who contributes in the capital (*ra's al-māl*). Therefore, he shall be entitled to gain profit according to the terms of the contract. He may also set up conditions in the contract aimed at fulfilling the best possible use of capital and gaining the maximum profit or reducing the possibilities of loss, or any stipulation deemed to produce advantage to him[53]. However, he may not restrict the investment in narrowly, as to ask the agent-manager to invest in some scarce merchandise, or even to invest for a very limited period[54]. As far as the profit is concerned, it should be specified in the contract[55]. But if there is not any profit from such investment, the owner may not claim any compensation from the agent-manager[56].

These stipulations are of three kinds: valid stipulations (*shorūṭ ṣaḥīḥa*), invalid stipulations (*shorūṭ bāṭila*) and disputed stipulations (*shorūṭ khilāfiyya*), and they are as follows:

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[53] Mahrān, M., *Istithmār al-Māl ʿan Ṭarīq al-Muḍāraba*, (Dār al-Thaqāfa al-ʿArabiyya: Cairo) (1990), p. 107.
[54] Al-Nawawi, *op.cit.*, vol. 12, pp. 157-160.
[55] Al-Jazīri, A, *Kitāb al-Fiqh ʿala al-Madhāhib al-Arbaʿa*, (Dār al-Fikr: Beirut) (2002), vol. 3, p. 38.
[56] Al-Nawawi, *op.cit.*, vol. 12, p. 147; al-Zuḥayli, *op.cit.*, vol. 4, p. 868.

7.4.4.1.1 VALID STIPULATIONS:

Scholars agree on these stipulations because they do not contradict the purpose of the contract of commenda, and do not legalise any prohibitions with respect to travelling, such as the owner's abstinence from travelling with property of commendaship (*māl al-muḍāraba*) or travelling with any property for investment[57]. Furthermore, when the owner stipulates not to invest in specific merchandise, it is because it brings benefit to him, as in the case when the price is not settled for this particular merchandise. Therefore, the profit remains in doubt[58].

7.4.4.1.2 INVALID STIPULATIONS:

Scholars also agree on these stipulations because they do not contradict the purpose of the contract of commenda. These stipulations include prohibitions. For instance, the owner may stipulate in the contract that the profit and loss is to be divided between parties. However, this stipulation contradicts the purpose of the commendaship in the sense that only the profit is to be divided between parties, whilst the loss is to be borne solely by the owner[59].

Moreover, the stipulation that fixes an amount of profit, i.e. £ 1000, is illegal, since the purpose of commendaship is the setting up of a percentage

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[57] Al-Sarakhsi, *al-Mabsūṭ*, *op.cit.*, vol. 22, p. 39; al-Nawawi, *op.cit.*, vol. 14, p. 108.
[58] Mālik Ibn Anas, *al-Mudawwana al-Kubra*, *op.cit.*, vol. 12, pp. 116-7.
[59] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 67.

of profit for parties[60]. In addition, the stipulations that each party has a profit from one specific half of the capital or the profit of one of the two merchandises or the profit of specific journey or the profit of a specific month or year … etc., are null and void as it may lead to one party gaining more profit over the other[61].

Another example of such stipulations is when one party is allocated a specific amount of profit, i.e. £ 3000, and the remaining of profit either goes to the other party or is to be divided between parties, such a party me be allocated the only profit[62].

7.4.4.1.3 DISPUTED STIPULATIONS:

Scholars disagree over the nature of these stipulations, particularly over the principle that the profit is solely for one party. According to Ḥanafi scholars, this stipulation is legal[63]. This contract is usually converted into a contract of loan when the entire profit is for the owner, and into the contract of *ibḍā ʿ* when the profit is solely for the owner. However, another view considers such stipulation as illegal.[64] It appears that the first view is better, because modifying a contract is better than rendering it null and void.

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[60] *Ibid*, at p. 38.
[61] *Ibid*, at p. 39; al-Sarakhsi, *al-Mabsūṭ*, *op.cit.*, vol. 22, p. 23.
[62] Al-Kāsāni, *op.cit.*, vol. 6, p. 86; al-Nawawi, *op.cit.*, vol. 14, p. 199; Malik Ibn Anas, *op.cit.*, vol. 12, p. 109; al-Sarakhsi, *op.cit.*, vol. 22, pp. 149-50.
[63] Al-Dusūqi, *Ḥāshiyat al-Dusūqi ʿAla al-Sharḥ al-Kabīr*, (1980), vol. 3, p. 468.
[64] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 35.

Furthermore, inserting time bar for the contract, as well as the principle of buying from specific merchant or buying particular merchandise is a disputable stipulation[65]. Those who believe that such stipulation is legal support their view by saying that such stipulation does not prevent profit[66], besides such stipulation has advantage because people are different in terms of trust and confidence (*al-thiqa wal amāna*) as the buying from particular person(s) brings profit because he is easy to deal with[67]. Those who said such insertion is null and void justify their position by saying that such stipulation may have an impact on the freedom of trade and its influence[68].

7.4.4.2 THE DUTIES OF THE OWNER:

The fundamental obligation that rests upon the owner is to provide the capital to the agent-manager. The liability of the owner is limited to the provided capital. Hence, he is not entitled to contribute in the management of the purported capital. Once he interferes in the management of the capital, the contract of commenda becomes imperfect (*fāsid*) and convertible to contract of hire. Accordingly, the agent-manager is entitled to customary remuneration (*ujrat al-mithl*), regardless of whether or not there has been a profit.

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[65] *Ibid*, at p. 69.
[66] *Ibid.*
[67] Al-Kāsāni, *op.cit.*, vol. 6, p. 100.
[68] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 69.

As a general rule, each party is entitled to withdraw a contract as long as the contract has not been effected. However, when the agent-manager invests a portion of the provided capital for the preparation of journey, he is not entitled to terminate the contract, unless the expenses are from his side, in which case if the owner decides to cancel the contract, he should reimburse the agent-manager any expenses incurred[69].

Article 215 of the COS stipulates that:

> A merchant or any other person who made a promise to give command of a vessel to someone and made this promise in writing or in the presence of witnesses, cannot withdraw such an offer from the party to whom he made it originally. If he should want to withdraw it, and the party who had been promised such a command had incurred some expenses in connection with the promised offer or had leased a vessel in conjunction with such a promise, he should be fully reimbursed for any expenses and damages. This article is written because a party who had been given a promise of getting command of a vessel would not have engaged so large a vessel had not he depended on the promise made to him, but would have limited himself to engaging a smaller vessel, sufficiently large to expedite his own interests in getting ready to ship his own cargo on the journey that had been planned.

7.4.4.3 THE RIGHTS OF MUḌĀRIB:

Muḍārib is entitled to manage the capital he receives from the owner, as he is the sole person who has the right to do so according to the contract of commenda. In doing so he may be entitled to have the profit reimbursed for the expenses he has incurred for the purpose of investing such capital.

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[69] *Al-Mawsūʿa al-Fiqhiyya, op.cit.*, vol. 38, pp. 91-3.

7.4.5.3.1 THE EXPENSES:

There are two types of expenses. One type is for the purpose of contract such as, freight, fees, customs, expenses for warehouse, and tax. These expenses should be taken from the profit[70]. The other type is personal expenses such as, food, clothing, accommodation and transport. But is a party entitles for reimbursement for such expenses? Al-Shāfiʿi held that *muḍārib* is not entitled to any expenses he has incurred even if he travels, unless he has been permitted to do so by the owner. He supported his view by saying that he deserves profit only and nothing more, and any additional money he receives from the owner means gaining more benefit than what has been agreed upon in the contract of commenda[71].

However, most of scholars adhere to the view that *muḍārib* is entitled to such expenses only in the case when he travels. Others are on the view that he deserves to be reimbursed for such expenses whatsoever[72]. Such expenses should, without prejudice, be in accordance with the prevailing custom, unless the agent-manager incurs expenses which are not recognised under the prevailing custom[73]. These expenses should be taken from profit,

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[70] Al-Nawawi, *op.cit*., vol. 12, p. 165.
[71] Al-Zuḥayli, *op.cit*., vol. 4, p. 864.
[72] *Ibid*, at p. 866; Ibn Rushd, *al-Bayān wal Taḥṣīl*, vol. 12, pp. 336-7, 364.
[73] Al-Zuḥayli, *Ibid*; al-Nawawi, *op.cit*., vol. 12, p. 165.

but if there were not any profit the *muḍārib* is entitled to be reimbursed from the capital[74].

7.4.5.3.2 THE PROFIT:

Muḍārib may be entitled to profit under the contract, but if there is not any profit, he receives nothing. Before distributing profit, a *muḍārib* must return the capital to the owner. If the parties do not reach an agreement over the share of each of them, they should share the profit according to fair commenda (*muḍārabat al-mithl*), applying the prevailing customs under these circumstances[75].

Article 255 of the COS, entitled "Responsibility for Cargo Entrusted to a Party According to the Customs of the Sea," provides:

> However, if at the time they mutually agreed to this arrangement there was no mention made of the amount of money the one who accepted the care of the cargo would be given for the performance of this task, the latter should not deduct anything for his trouble, for he was not allowed to do this, but should immediately after the return from the journey for which he had undertaken the care of the cargo, report to its owner and give him the full amount he had received for the cargo. The owner of the cargo shall pay the party who had taken care of his cargo for his trouble and care proportionally to the amount he had received for the cargo. The amount shall be determined by the owner of the cargo, and the party who had been commissioned to care for and sell the cargo cannot force him to any additional obligation.
> Therefore, let every person who accepts care of another's cargo be most careful when he takes this obligation that he

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[74] Ibid.
[75] Al-Nawawi, *op.cit.*, vol. 12, pp. 174-5.

shall not be left to the disposition of the person who entrusted him with the care of such cargo and be dependent for his wages upon the whim of the former.

There is a conflict between the preceding Article and its title, which indicates that the custom should be applied in the event of no mention in the contract to the amount of money that should be shared between the parties. Such conflict may leave people in doubt over such situation; that is to say, doubt of whether it is the custom which should determine the amount of money or the owner. By and large, when the contract is silent over a matter the custom prevails and takes priority over anything else.

7.4.5.3.3 MANAGEMENT:

The fundamental difference between the contract of commenda and partnership is that under the former the agent-manager is the sole person who manages the capital he receives from the owner and the owner is not permitted to share the management with him. *Muḍārib* is independent and free to manage the capital; and therefore, entitled to buy and sell for the benefit of contract. In addition, he may delegate a third party to carry out some tasks for commendaship[76]. He may also mortgage the capital and take pledge from debtors.

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[76] ʿAbdulqādir, A., *Fiqh al-Muḍāraba fil Taṭbīq al-ʿAmali wal Tajdīd al-Iqtiṣādi*, (Cairo: Maṭābiʿ al-Ittiḥād al-Dawli) (1980), p. 34.

It is worth mentioning that in terms of restriction, there are two types of *muḍāraba*, restricted and unrestricted. The unrestricted commendaship is when the owner provides the capital to agent-manager and that he has freedom to invest this capital in any aspect. Therefore, he is entitled to the entire transaction related to trade, including mortgage, pledge, hiring, *muḍāraba*, depositing, and other transactions that are carried by merchants, save for contracts of gift (*tabarru ʿāt*)[77]. The restricted *muḍāraba* is when the owner presents his capital to the agent-manager. However, he (owner) stipulates some restrictions to the investment[78], as explained above, and the failure on the part of the agent-manager to maintain these restrictions will make him liable for the consequences.

We shall explain in particular the case when the owner tells the agent-manager to invest according to his thought. This may be possible in the following cases:

Investment.

Company and Mixing up the capital.

7.4.5.3.3.1 IN THE CASE OF INVESTMENT:

When the owner tells the agent-manager that he is free to invest the capital on the way he (agent-manager) deems to be the best way that brings benefit

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[77] *Ibid*, at pp. 33-4.

[78] *Al-Mawsūʿa al-Fiqhiyya*, *op.cit.*, vol. 38, pp. 38-9.

to commendaship, the agent-manager is entitled to, for example, present this capital to another agent-manager for the purpose of investment, and therefore share the profit with the new agent-manager. Yet this depends on the consent of the owner[79]. As for the case when the owner does not permit the agent-manager to enter into new investment, there are two views: the first view states that once the agent-manager receives permission to invest in capital, he is entitled to enter into new investment regardless of consent. The second view does not permit such investment without understandable consent[80].

7.4.5.3.3.2 COMPANY AND MIXING UP THE PRINCIPAL CAPITAL WITH OTHERS:

He is also entitled to mix up the capital with his own capital, the final say is the agent-manager's without any enforcement from the owner[81]. When the agent-manager mixes up the capital with his own capital and gains profit after obtaining consent of the owner[82], the earnings should be shared between the two capitals. At the fulfillment of the contract, the agent-manager separates his capital and his profit, and therefore, shares the profit with the owner after giving him back his capital.

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[79] For details see, al-Salmi, *op.cit.*, pp. 199-200.
[80] Al-Salmi, *ibid*, p. 200.
[81] Ibn Rushd, *al-Bayān wal Taḥṣīl*, *op.cit.*, vol. 12, p. 349.
[82] Whilst when the agent-manager mixes up the two or more capitals without gaining consent of the owner, the contract of commenda is rescinded. For details see, al-Mawardi, *op.cit.*, pp. 176-7.

On the other hand, if the agent-manager invests his capital and gains profit, such profit should be shared with the owner, whilst if he incurs any loss, he is the one who shall be liable for such loss[83]. Al-Sarakhsi commented on this point, stating that the agent-manager is entitled to borrow when he obtains permission from the owner, and whatever he borrows shall be shared between the owner and the agent-manager, yet such transaction is not regarded as commendaship[84]. Ḥanbalites[85] and Ḥanafites[86] allow such transaction, whereas the Mālikites do not allow such transaction without obtaining the consent of the owner[87].

Article 216 of the COS was inspired by the Islamic law in the case when the agent-manager receives capital and at the same time invests his own capital.

It thus states:

> If a party is given command of a vessel, and having its own resources, invests them at the place where the command is given, in addition to investing other moneys given by others, and after arrival at the destination specified in the agreement, makes profit on the cargo in which its money has been invested, but makes no profit on the cargo of others who have entrusted it with the command, then such party shall share the profit it has made with the others who have made an investment in that same journey.
> If, however, it should lose only its personal investment in such a transaction, it will have to sustain the loss if the party who has entrusted it with the command and given it money to invest specifies that the money is to be used only for a specific purpose.

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[83] Ibn Rushd, *al-Bayān wal Taḥṣīl*, *op.cit.*, vol. 12, pp. 345-7; *Al-Mawsūʿa al-Fiqhiyya*, *op.cit.*, vol. 38, pp. 38-9.
[84] Al-Sarkhsi, *al-Mabsūṭ*, *op.cit.*, vol. 22, pp. 178-80.
[85] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, pp. 50-1.
[86] Al-Sarakhsi, *al-Mabsūṭ*, *op.cit.*, vol. 22, p. 389.
[87] Al-Kharashi, *op.cit.*, vol. 6, p. 210.

> If there has been no such stipulation made and it has not lost both its own money and the money entrusted to it for investment by others, whatever profits or losses there are shall be divided proportionally to the amount of money invested by each party.

Article 217 deals with the situation when the agent-manager does not follow the instructions of the owner. This article was also inspired by the Islamic law. Thus, it stipulates that:

> If it should use the money entrusted to it for other purposes in spite of the orders given to it by the party who has ordered it to buy a certain kind of cargo, but it earns a profit on such a transaction, it shall give all of the profit to the party which has entrusted it with the money. If, on the other hand, it has bought a cargo other than the one ordered by the party who has entrusted it with the money, and should lose some or all the money in such a purchase, it shall reimburse the owner the money in full, because he has acted contrary to the orders he has received, for no one can have more right to dispose of the wealth of another person than he is.

As it is recognised under the Islamic law, the agent-manager is free to enter into another contract of commenda, as long as it does not prevent him from undertaking the first contract of commenda. If there are not any restrictions in the contract that prevent the agent-manager from entering into new contract of commenda, he is entitled to mix up the capital with the capital of another owner. However, he is a guarantor (*ḍāmin*), yet if the owner asks him to invest his capital separately from the new contract, the agent-manager must comply with such instructions[88].

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[88] Saḥnūn, *op.cit.*, vol. 12, p. 107.

Article 220 of the COS adopted the same principle recognised under the Islamic law, with respect to mixing up two capitals. Hence, it provides that:

> If a patron of a vessel accepts a cargo belonging to a trading association in addition to accepting merchandise or money entrusted to him by an individual merchant, and at the moment of acceptance of such cargo or money fails to inform the merchant that his cargo or money will be added to the cargo or money entrusted to him by the association, or does not make a written statement that the money and cargo of such an individual must be considered as part and parcel of the cargo owned by the association that he has taken aboard his vessel, he shall be held individually responsible for the cargo or the money entrusted to him by the individual merchant.
>
> If he has been given money to buy certain cargo, he shall make a full accounting of what he has bought for the money he has received from selling the cargo he has carried, as well as of what statement he has made of the money he has received. He shall make such an accounting after returning from the voyage and shall give back the merchants all their moneys invested and profit made in such transactions, after deducting the compensation due to him as has been mutually agreed.
>
> If, however, it should happen that he accepts the responsibility for the cargo belonging to the association as well as accepting command of the vessel, and should mix the cargo belonging to the association with the cargo belonging to the party who has entrusted him with the command of the vessel without informing the party who has given him command of the vessel about this, and due to this shall not be able to make proper accounting, the party who has entrusted him with the command of the vessel may demand payment for his cargo at the highest prices that such cargo commanded at the place where it was sold as well as the highest possible lading charges for the cargo carried aboard and the highest potential profits that could have been made selling the cargo.

7.4.4.4 DUTIES OF MUḌĀRIB:

7.4.5.4.1 MANAGEMENT:

It is known under Islamic law that the agent-manager shall personally take the responsibility of management according to the prevailing custom[89]. This is the fundamental undertaking of the contract of commenda. However, he may entrust the difficult tasks to some experienced person[90]. Furthermore, he should not accept another contract of commenda if it is deemed to divert him from investing the first contract[91]. In addition, he shall comply with the provisions of the contract of commenda as long as it does not contradict the nature of the contract of commenda. Therefore, he shall be liable for any damage or loss caused due to his fault or when he transgresses the authorities entrusted to him under the contract[92].

7.4.5.4.2 PROTECTION AND PRESERVING:

He should also protect and preserve the property of *muḍāraba* and should not expose it to danger or loss. If the property is taken by force (*ghaṣb*) or even being transgressed, he should claim it by taking action through legal prosecution at the absence of the owner[93].

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[89] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, pp. 55-6; Mahrān, *op.cit.*, p. 80.

[90] ʿAbdulqādir, *op.cit.*, p. 34.

[91] *Ibid*, at p. 93.

[92] Al-Salmi, *op.cit.*, pp. 203-8, Mahrān, *op.cit.*, p. 79.

[93] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 56.

7.4.5.4.3 CONTRACT STIPULATIONS:

Moreover, the agent-manager should not buy any goods that may exceed the limit of the amount of the capital unless the owner allows so[94]; a transaction disallowed by the Māliki jurists even if the owner allow it[95]. Also, the agent-manager should not borrow for the purpose of investment or even fix shortage in the contract of commenda. It is said that borrowing is an establishment of excess in the limit of the amount of the capital and; therefore, establishing an excess in liability on the part of the owner without his consent[96].

When the agent-manager buys new goods that exceed the limit of the amount of capital, or borrows for the purpose of commenda, he shall abide by these new obligations. In fact, he is a partner to the contract of commenda for any exceeding amount, and so he may be entitled to profit as long as he is liable for that exceeding amount. Further, if the owner permits the agent-manager to borrow for the purpose of commenda, the borrowed amount should be shared amongst them. Hence, the agent-manager is entitled to profit for the borrowed amount, and he shall abide to the settlement of such borrowed amount[97].

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[94] Al-Nawawi, *op.cit.*, vol. 12, p. 183; al-Salmi, *op.cit.*, pp. 210-13.
[95] Al-Kharashi, *op.cit.*, vol. 6, p. 216.
[96] Al-Kāsāni, *op.cit.*, vol. 6, 32.
[97] *Ibid.*

Article 239 of the COS corresponds to the previous principle. Hence, it states:

> Further, if the patron finds himself in a locality where none of the shareholders are present, and if he does not have personal funds or mutual funds with him and is forced to arrange for a loan under such circumstances, all the agent-managers in the vessel shall be responsible for the repayment of such loan, and none of the shareholders shall oppose this move.

However, the partners are not liable personally to reimbursement. Therefore, the preceding paragraph maintains: "If the vessel is lost before the loan is paid off, none of the shareholders shall pay the lender anything, because the vessel has been wrecked and lost." It seems that the author of the COS went beyond the principles of the contract of commenda in the case of common property. This is perhaps to remedy the situation when the partners are adamant in refusing to buy equipment despite its usefulness for the safety of the journey. Hence, the Article stipulates that:

> If the shareholders refuse to permit the purchase of these essentials, and the patron is convinced that the items lacking are essential to the welfare of the vessel, he shall not be discouraged by the refusal of the shareholders but shall buy these essentials; and this is due to the fact that the shareholders will probably remain safe on shore and are indifferent to the dangers that others will face on the high seas, as long as they are making profit. For these reasons, the shareholders should not oppose the purchase of essential equipment, because the patron had determined that such equipment is vital to the safety of the vessel, and if it is lacking, the vessel would be threatened by great danger, and the patron would himself later be subject to accusations made by the merchants. For these reasons, therefore, the shareholders shall not oppose the acquisition of such equipment.

According to the preceding Article, the shareholders may be liable by the end of journey to pay "the full amount; that is, his share, in proportion to the amount of the investment in the vessel."

7.4.5 THE LIABILITY OF PARTIES:

7.4.5.1 IN GENERAL:

The owner is the sole party liable for the loss that the capital sustains as a result of force majeure and any agreement contrary to this principle is deemed null and void[98]. However, the owner may not be liable for the transgression of the agent-manager when he goes beyond the limits of the authority conferred upon him. In fact, the agent-manager is the party who shall be liable for his faults, particularly if his actions are deemed to transgress the authority conferred upon him. Therefore, he shall be liable for compensation to the injured parties, as well as the owner[99].

The injured parties may be entitled to compensation and that can be obtained from the property in the hands of agent-manager. If the property is not limited to covering the compensation, the injured parties may claim the remaining amount from the agent-manager's account (*dhimma māliyya*). Note that the injured parties are in any case not entitled to claim compensation from the owner if the property in the control of the master

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[98] Al-Kāsāni, *ibid.*
[99] Ibn Ḥazm, *al-Muḥalla*, *op.cit.*, vol. 8, p. 248; Mahrān, *op.cit.*, p. 96.

(agent-manager) has not been confined to the purpose of covering their claim. The owner, contrariwise, may claim reimbursement from the agent-manager if the property of investment is sold in order to cover the compensation due to the fault of the agent-manager. These liabilities are illustrated below.

7.4.5.2 THE AGENT-MANAGER (MUḌĀRIB) LIABILITY:

As explained above, the agent-manager is the person who is solely responsible for investment. Hence, he is liable for any loss due to his transgression over the authority conferred upon him. However, he may not be liable for the loss caused by force majeure. Thus, the liability of the agent-manager towards the third party and the cases where he may not be liable are demonstrated below.

7.4.5.2.1 THE LIABILITY OF THE AGENT-MANAGER TOWARDS THE THIRD PARTY:

The agent-manager is the party who is entrusted with the task of investing the capital in the contract of commenda. Therefore, he is liable for the loss if he abuses any authority invested in him[100]. Under the terms and conditions of the contract, he is not permitted to borrow for the purpose of contract of commenda; and his power is limited with respect to the purchase

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[100] Ibn Ḥazm, *ibid*.

of property whose value exceeds the limit of the given capital. If he does so, then he shall be liable for any loss or damage because, when the value of the property exceeds the limit of capital it is deemed as loan. Thus, he shall be liable to pay these amounts[101]. If the agent-manager buys what he is not allowed to buy and subsequently gains profit, any such profit is, according to some scholars, belong solely to the owner[102]. In the event of force majeure, he may sell and mortgage any property of the specified capital[103].

Because the agent-manager exercises the exclusive authorities over the capital, in his relations with the third party, he appears as he is the owner of the property that is in his possession. If he commits a fault or transgresses the prearranged authority, the injured party may bring legal action against him, not against the owner. The property in the possession of the agent-manager is the guarantee to the injured party, and if it is insufficient to cover the compensation, they (injured parties) may claim the remaining amount from the agent-manager's amount.

The COS includes some provisions that are similar to those of the Islamic Law, with respect to the liability of the agent-manager towards the third party. Hence, many provisions establish the liability of the master (agent-

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[101] for details about when the agent-manager borrow and exceed the limit of amount of capital and entering into company with another agent-manager without taking consent of the owner and selling however receiving price in future (*bayʿ al-nasī'ah*) see, Mahrān, *op.cit.*, pp. 98-101.
[102] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 54.
[103] Al-Kharashi,*op.cit*.

manager) on the subject of the loss to goods due to his fault. Article 186 provides that:

> If a patron leases a vessel to the merchants for a fee or accepts cargo for shipment, charging them a specific amount per quintal of cargo, and then stores and transports this cargo on the deck of his vessel without the consent and approval of these merchants, and the cargo stored in this manner is lost or damaged, other merchants who are also shipping cargo aboard this vessel will not be required to pay for the damages sustained by the merchants to whom the lost or damaged cargo belong, even if such cargo has been entered in the register of ship. However, the patron of the vessel shall reimburse the merchants who have sustained damage of their cargo or have lost it, to the full amount of its value.

Moreover, the master who has been instructed by the merchants to tie the goods properly has not complied with these instructions. Article 227 provides that:

> If the patron anchors his vessel near the shore, in port, or some other place, and the merchants aboard warn and caution him that he should provide a stout hawser to anchor the vessel, and the patron moors the vessel with a weak and unsatisfactory hawser, or if he does not have the proper equipment aboard the vessel to do this, although he has claimed that he did, and the merchants suffer some damage due to this negligence, the patron of the vessel shall be required to reimburse them for their losses.

Moreover, Article 289 of the COS, like the Islamic Law, deals with the liability of the master for the damage the third party sustains as a result of transgression of certain authorities by the master. Thus, it provides that:

> If an owner of a vessel entrusts another party with its command, and the party accepting the command reaches some agreement or makes some promises to the person or persons who have entrusted him with this command and then fails to fulfil these promises, and the parties from whom he has accepted the command suffer by his neglect

any losses or damages, he shall reimburse them for all such losses and damages, even if it becomes necessary to sell the vessel.
Further, if the party who gives the vessel to another to command suffers or has been in danger of experiencing some damage by the negligence of the party who accepts the command, the latter shall pay all the damages and losses…

Moreover, Article 227 of the COS refers to the case where the value of property in the possession of master is insufficient to cover the amount of compensation of the injured parties; resulting from the master's negligence. Hence, it provides that:

> If the patron is without the means to pay for these damages, the vessel shall be sold. If the amount realized from the sale of the vessel is insufficient to pay these damages, and the patron has other property, such property shall be sold to satisfy the merchants, provided that the crew do not lose any of their wages. The shareholders of the vessel shall not share in the payment of these damages beyond the amount they have invested in the vessel.

7.4.5.2.2 THE LIABILITY OF THE AGENT-MANAGER TOWARDS THE OWNER:

Once the contract of commenda is fulfilled, the agent-manager shall return the capital to the owner and subsequently share the profit according to the terms and conditions of the contract. If there is not any profit, he shall return the capital or the remaining thereof to the owner. This is when the investment sustains a loss. The rule under these circumstances is that when the commendaship sustains a loss and gains a profit, the loss should be covered from the profit and if it is not sufficient, then it should be covered

from the capital[104]. However if the loss has been caused by negligence or transgression of the authority conferred, then he shall compensate the owner for such loss[105].

Thus, when the agent-manager trade consists of perishable merchandise, such as fruits and vegetables; and he has been negligent because he has not sold them quickly or has not stored them in an adequate place, he shall be liable for any loss or damage caused to such merchandises. This liability is applied when negligence is linked to the work. This is because the agent-manager in the contract of commenda is the fiduciary (*amīn*) who is only liable in the event of negligence[106].

When the owner gives the agent-manager the freedom to exercise his authority as he believes it will reflect positively on the contract, he may surrender the capital to a third party or to enter into partnership with another person, or mix up the capital with his property and principal capital. Contrariwise, if he does so without the consent of the owner, he may be liable for the consequences of his breach. Likewise, Articles 218 and 219 of the COS adopt the perspective of *Sharī'a*. Hence, Article 219 stipulates that:

> If the principal owner of a vessel entrusts it under the command of another party without the knowledge of its shareholders, and the latter after completing the voyage

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[104] Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 60.
[105] Ibn Qudāma, *al-Mughni*, *ibid*, vol. 5, p. 56; Mahrān, *op.cit.*, p. 102.
[106] Ibn Hazm, *al-Muḥalla*, *op.cit.*, vol. 8, p. 248.

> returns and gives an account of the transactions during the voyage to the party who has given him the vessel to command; and if the latter in turn pays each of the shareholders his share of the profit due to him on the basis of his shares in the vessel; and if the shareholders accept their shares of the profit due to them on the basis of the amount of their investment in the vessel, and then some or all of them inform the party they have appointed as the patron of the vessel that they do not wish him to give command of this vessel to anyone without their approval; and if contrary to this provision the patron of the vessel proceeds to do so, he shall be liable for all the damages, losses, and expenses sustained by the vessel.
> If, in the circumstances mentioned above, the shareholders after informing the person whom they elected the patron of the vessel in which they had invested their money, would give command of this vessel to another party without their approval, or at least the approval of the majority of them, he shall divide among them, proportionally to the amount of their investment, all the profits made by the party to whom he had entrusted the command of the vessel.

Article 218 deals with the relations between the master (principal agent-manager) and the second agent-manager on the one hand and, the master and shipowner(s) on the other. Thus it stipulates that:

> If an owner of a vessel gives it over to command of another party in order that the latter may make a specific voyage, and if during such a voyage, while the vessel is sailing to or from the port of destination, or while anchored in the port of destination, the vessel is wrecked or damaged, the party who has accepted command of the vessel shall not be liable for any of the damages to the owner of the vessel, who entrusted it under his command.
> However, if the party in command of the vessel changes the course of the vessel or undertakes some other journey not included in the agreement set up between them, and if the vessel is wrecked or damaged, the commander of the vessel shall repay the owner of such a vessel the full value of the vessel plus all other damages that the owner has sustained. Should he be unable to pay such damages, he shall be imprisoned until he is able to satisfy the owner who has entrusted the vessel under his command; whether he is able to repay the owner of the vessel for the damages or not, the owner of the vessel is required to repay the

shareholders their share in the vessel as well as a share of the profit they are entitled to according to the amount of their investment in the vessel.

As for the relations between the master and the shipowners, the preceding Article adds: "If, however, the command of the vessel is entrusted to a party with the full knowledge and agreement of the majority or all of the shareholders and the vessel is subsequently wrecked under the circumstances mentioned, the principal owner shall not be liable to pay the shareholders any damages,..."

In addition, Muslim scholars are of the opinion that the agent-manager may accept new contract of commenda provided that he obtains the permission of the owner and provided that such contract does not prevent him from managing the principal contract. Further, the agent-manager should compensate the owner for any loss he has sustained if his engagement in another contract led to the damage of the principal contract[107]. Hence, Article 222 provides that:

> If a patron of a vessel transports his own cargo in addition to other cargo entrusted to his care and cannot remain at the port where the vessel docks in order to sell his cargo, and if the vessel is ready to depart from that port but is delayed waiting for him to give the order to unfurl the sails, and if due to such delay the owners of the vessel incur some expense, the master of the vessel shall reimburse them from his own cash box, if he should remain at the port where the vessel has been cargoed in order to sell his personal cargo without the knowledge of the shareholders of the vessel, and in the meantime the vessel has sailed, he shall be liable for any damages caused

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[107] **Sahnūn**, *op.cit.*

> to the vessel. If, however, he has reached an understanding with the majority or all of the shareholders that he can remain behind while the vessel sails, and if the vessel sustains some damage, the patron of the vessel shall not be liable for the damages sustained by the vessel.
> Further, if the patron of the vessel had remains behind to collect on the lading charges due and not for any other reason, and due to this necessity of remaining behind, he dispatches the vessel in order to avoid some expenditures, and the vessel so dispatched suffers any damages, the patron shall not be liable to pay these damages to the shareholders because he remains behind in the interest of the vessel and not for any other reason. He shall act without any attempt at deception or fraud.

As far as the Islamic law is concerned, there is no restraint on the owner to stipulate in the contract any condition that may reduce the risks of loss or damage to his capital, as for example to stipulate in the contract the undertaking of transactions in specific place[108] or to trade in particular merchandise or not to travel with the property of investment or even if he allows the agent-manager to travel, only to a particular destination[109]. Once the agent-manager complies with these stipulations, he may be entitled to profit and shall not be liable for any loss in the absence of his negligence. However, if the agent-manager breaches such stipulation he shall be liable for any damages caused by such breach[110]. Article 210 of the COS allows the shipowner to stipulate corresponding conditions thereto recognised under the Islamic law:

> Any merchant or sailor or any other person who accepts command of a vessel for a specific voyage or to a specific

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[108] Mālik Ibn Anas, *op.cit.*, vol. 12, pp. 116-7.
[109] Al-Nawawi, *op.cit.*, vol. 14, p. 205.
[110] Al-Kāsāni, *op.cit.*, vol. 6, pp. 98-9; Mālik Ibn Anas, *op.cit.*, vol. 12, pp. 116-7; al-Nawawi, *op.cit.*, vol. 14, p. 205.

> place of destination, and during such a voyage or at the place of destination the cargo that he accepts under his command is lost but not due to his negligence, shall not be liable to replace such cargo or to pay any damages thereof.
>
> Further, if the party who accepts the cargo under his command proceeds with such cargo to another place or port other than what is specified in the agreement and the cargo is lost, he shall be liable to repay the entire loss to the party who has entrusted such cargo under his command because he has taken the cargo to a different location or port of destination than what has been agreed upon in the contract.

When the master complies with the provisions of the contract, he may not be liable for any damages caused at the point of destination. Hence, Article 211 states:

> If a party accepts command of a vessel for a specific journey to a designated port of destination, and having sailed away from the location where the agreement is concluded, arrives at the port of destination, where such party is pursued by privateers or hindered by some other obstacles imposed by the local authorities, or threat of action on the part of unfriendly naval units, and due to these circumstances the cargo entrusted under his command is lost, he shall not be liable to pay any damages to the party who has put the cargo under his command.
> However, if during the voyage and before reaching the place of destination, he learns about the existence of the probable dangerous situation there, but in spite of this knowledge proceeds there, thus inadvertently allowing the cargo to be lost, he shall be liable to pay full damages to the party who has entrusted him with the cargo under his command.

Furthermore, and as regards specific goods, Article 217 stipulates that:

> If someone entrusts a sum of money to a person with specific instructions to purchase a certain type of cargo, and the latter cannot find any such cargo for sale, he should find reliable witnesses who shall testify that he has been unable to find such cargo, and therefore could not use the money given him to buy the specified cargo, in order to clear himself of any charges or accusations if other

merchants have been able to buy the cargo he has been commissioned to purchase at the same place and the same time.
If he should use the money entrusted to him for other purposes in spite of the orders given to him by the party who orders him to buy a certain kind of cargo, but he earns a profit on such a transaction, he shall turn over all of the profit to the party who has entrusted him with the money. If on the other hand he has bought a cargo other than what he has been ordered by the party who has entrusted the money to his care, and should lose some or all the money in such a purchase, he shall be required to reimburse the owner of the money in the full amount because he has acted contrary to the orders he has received, for no one can have more right to dispose of the wealth of another person than he is given by that person.

7.4.5.2.3 THE CASES OF NON-LIABILITY:

Because the agent-manager is a fiduciary (*amīn*) he shall not be liable for any loss to the capital due to the transactions of investment, or due to a case of force majeure. Hence, the owner is not unrestricted to burden such loss to the agent-manager. The *muḍārib* may be deemed as a transgressor in two occasions: when he invests in unwanted trade by the owner, as in the case when it is agreed to invest in foodstuff, and trades in poultry, instead. The second occasion is when his act leads to a loss of capital, as in the case when he is told not to travel and he travels[111].

On the other hand, when the capital sustains loss without negligence or transgression, the owner rather than the agent-manager shall be liable for

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[111] Al-Mawardi, *op.cit.*, p. 231.

dasmages[112]. It is noteworthy that any provision which makes the agent-manager liable for loss or damage or a party thereof shall be deemed as null and void[113].

The COS contains various provisions that establish the case of non-liability. Article 221 stipulates that "Any person who accepts responsibility for any property, and such merchandise is lost due to the circumstances mentioned in preceding articles [220 and 211], shall not be liable to repay such damages." Article 220 provides that "The party accepting command of a vessel shall not be liable for any damages to the association in any way whatsoever, regardless of whether they make profit or suffer losses, and the members of the association shall not be liable in any way towards the party who has accepted command of the vessel. He shall be solely liable for whatever losses or profits he has incurred."

7.4.5.3 THE OWNER'S LIABILITY:

The owner is the party who is responsible for providing the capital. He is the party who bears the risks of the contract of commenda. However, his liability does not exceed the amount of the invested capital. Because he is not entitled to interfere in the management of such contract, then he may not

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[112] Al-Kāsāni, *op.cit.*, vol. 6, p. 87; Ibn Qudāma, *al-Mughni*, *op.cit.*, vol. 5, p. 48; al-Dardīr, *al-Sharḥ al-Ṣaghīr*, (Dār al-Maʿārif: Cairo) (1972), vol. 3, p. 694; *al-Mawsūʿa al-Fiqhiyya*, *op.cit.*, vol. 38, p. 69.

[113] Al-Zuḥayli, *op.cit.*, vol. 4, p. 854; ʿAbdulqādir, *op.cit.*, p. 26.

be responsible for the acts and contracts that have been concluded by the agent-manager without his consent[114].

Generally, when the agent-manager exercises his authority efficiently and without breach of contract, any sustained loss, if any, would be the loss of the capital; if such loss exceeds the amount of capital, then the agent-manager should bear the exceeding amount[115]. It is noted that the agent-manager is restricted to borrow for the purpose of contract, however when he obtains the consent of the owner, as explained above, to travel for the purpose of contract he should take with him the sufficient money for transactions and the expenses for such journey. In the event of force majeure, he may sell and mortgage any property belonging to the contract of commenda[116].

However, if the agent-manager is neglected and subsequently causes damage to a third party or even borrows for the purpose of the investment, the injured parties are restricted to claim any reimbursement from the owner with whom they have had no relations beforehand. However, they may claim compensation from the agent-manager from the property in his possession. As the owner is partner with the agent-manager, then he is restricted to protest against the selling of the property of investment for the

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[114] Al-Zuḥayli, *op.cit.*, vol. 4, pp. 855-8.
[115] *Ibid*, at p. 857.
[116] Al-Dardīr, *al-Sharḥ al-Ṣaghīr*, *op.cit.*, vol. 3, p. 694.

sake of reimbursing the creditors. In this respect, Article 186 of the COS stipulates:

> If the patron is unable to do this, his vessel shall be sold to satisfy these claims, and neither the shareholders of the vessel nor loan makers nor anyone else shall lodge any opposition to this with the exception of the sailors who have the right to demand that their wages be paid first. If the proceeds from the sale of the vessel are insufficient to cover the claims, and the patron has other property, such part of this property shall be sold as will be sufficient to pay the damages of the merchants. The shareholders in the vessel are responsible to the degree of their investment in the vessel.

Hence, the shipowners are not accountable personally for the remedy of damage derived from the negligence of the master. The property in the possession of the master, including the vessel, should be used to reimburse the injured parties. If the property and vessel are insufficient to meet the total amount of the compensation, the owners of these property are not accountable for any amount exceeding their amount of the specified capital.

On the one hand, the shipowner is not unrestricted to protest against the selling of vessel, on the other hand, the injured parties are not entitled to claim further amount to cover their compensation from the invested property from the shipowner. As for the loan that is concluded by the agent-manager for the purpose of contract of commenda, jurists are of the opinion that the owner is not liable for this debt[117]. Yet, the creditors are not

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[117] However māliki has different view that even with the owner's consent the agent-manager bears the consequences, al-Zuḥayli, *op.cit.*, vol. 4, p. 857.

prevented from claiming their reimbursement from the property in the possession of the master.

Article 239 of the COS, which deals with the subject of buying essential equipment and tools for the ship, provides that:

> Further, if the patron finds himself in a locality where none of the shareholders are present, and if he does not have personal funds or mutual funds with him and is forced to arrange for a loan under such circumstances, all the agent-managers in the vessel shall be responsible for the repayment of such loan, and none of the shareholders shall oppose this.
> Further, if a vessel is located in a place where the lender shall demand repayment of the loan, and if the patron has in his possession his personal money or the money belonging mutually to all the shareholders in the vessel, he is required to pay off the loan at once… If the patron does not have any personal money or money belonging to other persons, or earned by the vessel, or any mutual funds, and the lender forces the sale of the vessel in order to recover his loan …

However, according to the foregoing provision, if the ship is lost before the settlement of the loan, then ….

> none of the shareholders shall be liable to pay the lender anything, because the vessel is wrecked and lost. The lenders should be aware upon granting any loans, for the shareholders lose a lot with the loss of the vessel. For the reasons given above, the lender shall not demand anything from the shareholders in a vessel; he should be careful, therefore, when he lends out his money and remember that if a vessel is wrecked, its shareholders shall not be liable to pay for anything due from such a vessel.

Nevertheless, the Consulate of the sea lays down a different provision with respect to this matter when the loan is concluded to buy essential equipment and tools at the place where the partners are available. Thus, the master

shall ask for their permission to buy such equipment. If the shareholders decline to authorize the purchase of these essentials, and the master is convinced that the items lacking are essential to the welfare of the vessel, he shall not be discouraged by the refusal of the shareholders but shall buy these essentials. If the vessel is lost or grounded before the settlement of debt, the shareholder shall be solely liable to pay off the debt.

The author(s) of the COS rationalises the aforesaid provision by saying:

> this is due to the fact that the shareholders will probably remain safe on shore and are indifferent to the dangers that others will face on the high seas, just as long as they are making profit. For these reasons the shareholders should not oppose the purchase of essential equipment, because the patron has determined that such equipment is vital to the safety of the vessel, and if it is lacking, the vessel would be threatened by great danger, and the patron himself would later be subject to accusations made by the merchants. For these reasons, therefore, the shareholders shall not oppose the acquisition of such equipment.

According to the preceding provision, the author(s) of the COS depart from the principles of the contract of commenda and apply the principles of common property (*amwāl mushāʿa*). It is noteworthy that, when the shipowner refuses to permit the master to buy essential equipment and tools for the vessel he fundamentally breaches the contract of charterparty. This is because one of the essential undertaking of the latter contract is that the shipowner is bound to provide a seaworthy vessel, and if he does not comply with this undertaking, he may be in breach of one of the fundamental obligations, namely, the furnishing of a seaworthy vessel.

It appears that the principles of contract of commenda which were implemented during the medieval era are the origin of the doctrine of limitation of liability. Therefore, the author(s) of the Consulate of the Sea applied the principles of the contract of commenda on investment of ships. Article 295 asserts that the master should be deemed as an agent-manager: "every patron of a vessel must be treated and considered similarly to a party who has assumed control over all matters that occur in the relationship between the merchants and the owners of the vessel."

The aforementioned principles of contract of commenda were adopted by a number of legislations. In fact, they apply the doctrine of commenda on the liability of the master. Therefore, the shipowners may limit their liability, and such entitlement has been derived from the contract of commenda. The first of these legislations was the Marine Ordinance of Louis XIV of 1681.

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CONCLUSION:

By and large, researchers challenged each other to produce the same idea regarding the development of some principles of Maritime Law. They derived their views from one or two sources. In fact, they were influenced by the noted author Pardessus. Despite the fact that researchers used similar origin of sources, they were not satisfied with some particular doctrines which emerged during the medieval era. In actual fact, sheer assumptions were put forward to cover the lack of historical documents on the origin of these principles. Despite of that I did not come across any justifications for ignoring the role of Islamic law in maritime law, particularly when it is submitted the important role of Islam in many aspects of life..

The Roman Empire played an important role in almost every aspect of life, except probably in Maritime Law; for whilst Romans were so attached to land, they looked down on trade and merchants. In fact, the contribution of Romans to this field was described as "very faint"; and so was the Greeks'[1].

Pardessus noted that maritime trade flourished in some Mediterranean cities due to the Crusades. However, his view is contradictory, particularly when he mentioned that such cities did not have enough vessels to carry military men heading for the holy land and that they were influenced negatively by Crusades. Perhaps Pardessus relied on personal assumptions, ignoring the

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[1] See chapter 1 section 1.5.2.1.

Islamic civilisation during that period and, in particular, that which emerged in the Mediterranean and its influence on such cities. Civilisation, as such would not be the reason or a reason for the decline of trade in Europe at the beginning of the medieval era[2].

The examination of the provisions of the aforementioned three legal collections, namely the consulate of the sea, the Rhodian Sea Law and the Rules of Oleron reveal that they did not vary in substance, and contain principles that might have one source. In some occasions, an original provision of a particular set is found in another legal collection as in the case of some provisions of the Rules of Oleron which are found in the Consulate of the Sea[3].

The RSL is a collection of fragments or detached articles. Therefore, how can such collection be an origin of some particular principles?[4] There must be some other source(s) that may be in a better position than RSL. There was ample evidence that RSL was compiled in Southern Italy, as some parts of it contain the style and character of Southern Italy[5]. In fact, this part reveals that the *Sharī ʿa* was the applicable law[6]. It is noticed that the RSL never appears by itself in the manuscripts. It is often found in conjunction with other treatises, whether civil or ecclesiastical; a fact which has been

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[2] See chapter 1 section 1.5.2.2.
[3] See chapter 2 section 2.1.
[4] See chapter 2 section 2.2.1.
[5] See chapter 2 section 2.2.1.
[6] See chapter 2 section 2.2.3.

considered as an abnormality in the Roman law. However, this is one of the features of Islamic jurisprudence, whose subject matter includes issues on dealings (*mu ʿāmalāt*) and worship (*ʿibādāt*)[7].

As for the ROO, there were several controversial views over their origin. Whilst scholars agree that these Rules were a collection of judgments, there was a disagreement concerning their origin[8]. It has also been confirmed that these judgments had Islamic characters[9].

When we speak about the Consulate of the Sea, we should recall the great Islamic civilization in Spain, namely its influence on this part of the world and its flourishing in every aspect of life, including legal issues, especially in maritime law[10].

The Māliki jurisprudence was prevalent in Spain during the Islamic reign, at the beginning of the medieval ages and particularly in the thirteenth and fourteenth centuries, thus the COS and the RSL were inspired to some extent by Māliki jurisprudence rather than other Islamic school of thought.

Whilst the Shāfiʿi jurisprudence was prevailing in Syria and Palestine,

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[7] See chapter 2 section 2.2.2.
[8] See chapter 2 section 2.3.
[9] See chapter 2 section 2.3.
[10] See chapter 2 section 2.4.

where it is believed where the ROO derived its provision[11], therefore it can be contended that the ROO was inspired by the jurisprudence of Shāfiʿi[12].

Islamic maritime law was the first system to distinguish between the law of charterparty (*kirā' al-safina al-muḥaddada bi ʿaynaha*) and the contract of bill of lading (*kirā' al-safina ʿala al-ḍamān*)[13]. Islamic law recognised the contract of charterparty, and includes principles that are established now. Therefore, writing is not required for the conclusion of a contract, and a contract may be terminated if the shipowner fails to put the assigned ship at the disposal of charterer at the agreed time and place[14]. Furthermore, in the case of damage caused to the transported goods as a result of apparent defect in the ship, the shipowner may not be liable for such damage. In addition, the charterer may be entitled to the full use of the charterer vessel, and the master may not be entitled to use any space of the ship for carriage except for the charterer goods.

The parties may not be entitled to annul the charterparty when prevented by certain conditions. The party which causes damage shall reimburse the injured party, even when such conditions occur during the course of voyage. The merchant may unload his goods and the master should be patient and

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[11] See chapter two of this study.
[12] See for instance chapter four sections 4.3.1 and 4.3.2.
[13] See chapter 3 section 3.1.2 in particular.
[14] See chapter 3 sections 3.1.5.1 - 3.1.5.2.1.

give the merchant some time until the conditions are lifted so that he may sail to the point of destination under the contract.

As for the contract of bill of lading, the master is not liable for damage to goods if he stows it properly[15]. When the vessel becomes unseaworthy, the charterer may neither annul the contract nor waive such right, and shall pay full freight. The master may be liable when damage to cargo is due to his negligence, and he shall not be entitled to freight[16].

Scholars are in a dilemma concerning the issue collision at sea, particularly the doctrine of division of loss. Muslim scholars deal with such doctrine efficiently. According to Māliki and Shāfiʿi scholars, when both parties are to blame for the collision each party pays half of the entire loss or damage[17]. This doctrine was heavily criticised[18] and was, thus, superseded by the theory of apportionment of blame, according to which each party liable for loss sustained by other party(s), this is basically the opinion of Ḥanbali and Ḥanafi scholar[19]. Accordingly both doctrines, namely division of loss and apportionment of blame, which has been adopted since 1911, are the introduction of Islamic law.

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[15] See chapter 3 sections 3.2.4.2 - 3.2.4.3.
[16] See chapter 3 sections 3.2.6.1 – 3.2.6.2.
[17] This is basically the core of the doctrine of division of loss. See chapter 4 section 4-3.
[18] See chapter 4 section 4.3.3.3.
[19] See chapter 4 section 4.3.

During the course of this study, it was revealed that no earlier than seventeenth century a loss by collision was divided under a judgement passed by the English courts. The same judgement was applicable in French maritime law, as the division of loss first appeared under the Ordonnance de la Marine of Louis XIV of France 1681. Generally, the liability for the act of object, which was recognised under Islamic law, was not recognised before the promulgation of the Ordonnance de la marine 1681[20].

Stranded vessel and its goods were deemed as relinquished articles and the one who first collected them was regarded as the owner, and the salvage service was not recognised as such under these laws[21]. However, Islamic maritime law stipulates that people and property in distress be assisted, In fact Islamic law literatures are the oldest documents that prescribe an obligation of salvage and rescue[22]. The principles of the current maritime law allocate high rewards for those who provide salvage service. At the time of distress, the captains of the vessel should not ask for assistance before using all measures. Unfortunately in many occasions, when all measures are taken, they may lead to unwelcome casualties.

Due to the illegality of the contract of insurance under the Islamic law and because the maritime adventures require protection against danger to those involved in it, Islamic maritime law adopts principles that protect maritime

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[20] See chapter 4 sections 4.3.1 – 4.3.3.2.
[21] See chapter 5 section 5.2.
[22] See chapter 5 section 5.3.

adventure parties against danger which lead to loss or damage they may incur. Basically, the principles adopted by Muslim legists in general average are the foundation of marine insurance.

As for the limitation of liability, the contract of commenda is the basic source for the doctrine of limitation of liability[23].

From the aforementioned conclusion, it can be said that Islamic maritime law contributes to some extent to the current maritime law. This can be seen from the number of principles that might be considered as a foundation of some doctrines in maritime doctrines.

If any research intends to study the origin of particular principle in maritime law, then such study should cover as many as various sources and collections and should not be confined to some particular or prevalent collection; and that is the reason why Islamic jurisprudence should be considered in the so-called research.

This study shows the influence of Islamic principles on the legal collections, namely the COS, RSL and ROO, which are considered as the fundamental sources of the modern maritime law. The current study broaches many aspects of maritime law and it concludes that Islamic law contributed to some extent in originating some doctrines and principles of the maritime

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[23] See chapter 7 section 7.4.

law. It might be suggested further researches in the area of the sources of maritime law. If study is undertaken then it is recommended to be specified and focused on one branch of maritime law; this is to dedicate the efforts to be directed towards he identification of the common origin from which the current maritime law emerged.

GLOSSARY:

al-ʿawriyyāt al-ʿāmma (*al-khasā'ir al-mushtaraka*): general average.

ʿajz al-ṭarīq: tear and wear.

ʻāfa samāwiyya: misfortune from heaven.

ajīr: servant.

ajīr khāṣṣ: private carrier.

ajīr mushtarak: common carrier.

amīn: trustee, fiduciary.

amwāl ʿaqāriyya: immovable property.

amwāl manqūla: movable property.

amwāl mushā ʿa: common property.

ʿaqd al-muqāwala: contract of piecework.

ʿāqila: group responsibility.

baḥḥār: see *nūti* below.

bayt al-māl: treasury.

ḍamān: the civil liability, guarantee.

dhimma: capacity.

diyya: blood money.

fi ʿl al-safina: act of vessel.

fi ʿl al-shay': act of object.

al-ghayr: third party.

ghuramā': creditors.

ḥirāsat al-baḍā'i ʿ: safeguarding the goods.

hayāj al-baḥr: the fury of the sea.

ibḍā ʿ: depositing goods.

ijmā ʿ: consensus.

ijtihād: exerting oneself to form an opinion.

ikhtilāf al-rīḥ: changing wind.

injāz ʿamal: achieve performance.

al-inqādh al-baḥri: maritime salvage.

itlāf: damage.

jināyat yadoh: fault, oar.

ju ʿl: conditional promises.

khaṭa' mushtabah fihi: inscrutable fault.

khaṭa' mushtarak: mutual fault.

kirā' al-safina: charterparty.

luqaṭa: stray article, a find, wreck.

al-majmū ʿa al-dā'ina: creditor group.

al-majmū ʿa al-madīna: debtor group.

mas'ūliyya ʿaqdiyya: contractual liability.

mas'ūliyya taqṣīriyya: tortuous liability.

mithli: fungible article.

mūdaʿladayhi: custodian.

mūdiʿ: depositor.

muʿāmalāt: transactions.

muʿāwaḍāt: countervalue.

mubāḥ: permissible.

muḍāraba: contract of commenda.

muḍārib: agent-manager.

muḥābāh: partiality.

multaqiṭ: finder.

namā': increment, increase.

nāqil: carrier.

naqṣ: decrease.

naẓā'ir: equivalent.

nolon: freight.

nūti: crew.

qabḍ: possession.

qahri: inevitable.

qawl: utterance ??

qirād: contract of commenda.

qiyās: judicial reasoning by analogy.

quwwa qāhira: force majeure.

ra's al-māl: capital.

rabb al-ʿamal: investor.

rami al-biḍāʿa: jettison.

rubbān: master, captain, patron.

ṣadaqa: charitable gift.

safīna: vessel, ship.

shāḥin: shipper.

shaḥn: loading.

shakliyyat al-ʿuqūd: formation of contract.

shorūṭ bāṭila: illegal stipulations.

shorūṭ khilāfiyya: disputed stipulations.

shorūṭ ṣaḥīḥa: legal stipulations.

tābiʿ: subordinate.

taʿrīf: announcement.

tafrīgh: discharge, unloading.

tafsīr: interpret.

taqrīr: confirmation.

al-taṣadom al-baḥri: maritime collision.

tasṭīf: stowing.

ʿuqūd musammāh: named contract.

ujra: hire.

ujrat al-mithl: customary remuneration.

wājib: obligatory.

yatīm: orphan.

zakāt: almsgiving.

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